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No. 06-

IN THE

Supreme Court of the United States

HUMBERTO GONZÁLEZ,

Petitioner,

v.

MARÍA ANTONIETA MARTÍNEZ-AGÜERO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a *Bivens* cause of action, to defeat a claim of qualified immunity, a plaintiff must show a constitutional violation under current law. Is an alien without valid documentation to enter the United States, who is denied admission or entry at a port of entry to the United States, entitled to the protections of the Fourth and Fifth Amendments to the United States Constitution?

RULE 14.1 STATEMENT

Petitioner (defendant-appellant below) is Humberto González.

Respondent (plaintiff–appellee below) is María Antonieta Martínez-Agüero.

The United States of America (defendant below) is a party to the underlying action, but did not participate in the proceedings before the United States Court of Appeals for the Fifth Circuit.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 14.1 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	vii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	6
I. THE FIFTH CIRCUIT'S RULING CONFLICTS WITH DECISIONS OF THIS COURT AND SHOULD BE REVERSED.	7
A. The Fifth Circuit's Decision is Inconsistent with this Court's Decisions that Provide the Defining Point for the Attachment of Constitutional Rights to Aliens.	7

Contents

Page

B. The Fifth Circuit's Application of the Substantial Connections Test is Inconsistent with this Court's Decision in *Verdugo-Urquidez*. 12

II. LOWER COURT CONFUSION OVER *VERDUGO-URQUIDEZ'S* PRECEDENTIAL VALUE AND APPLICATION OF THE SUBSTANTIAL CONNECTIONS TEST COMPELS REVIEW. 15

CONCLUSION 20

TABLE OF CITED AUTHORITIES

Cases *Page*

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) 4, 6, 11

INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) 13, 14

Johnson v. Eisentrager, 339 U.S. 763 (1950) 8, 10

Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) 13

Lynch v. Cannatella, 810 F.2d 1363 (5th Cir. 1987) 5, 10, 11

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) 9, 10, 11

United States v. Angeles-Mascote, 206 F.3d 529 (5th Cir. 2000) 10

United States v. Barona, 56 F.3d 1089 (9th Cir. 1995) 17

United States v. Esparza-Mendoza, 386 F.3d 953 (10th Cir. 2004) 19

United States v. Esparza-Mendoza, 265 F. Supp.2d 1254 (N.D. Utah 2003) 18, 19

Cited Authorities

Page

United States v. Guiterrez, 983 F. Supp. 905 (N.D. Ca. 1998) *rev'd on other grounds*, 203 F.3d 833 (9th Cir. 1999) 16

United States v. Iribe, 806 F. Supp. 917 (D. Colo. 1992) 16

United States v. Tehrani, 826 F. Supp. 789 (D. Vt. 1993) 19

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) ..... *passim*

Zadvydas v. Davis, 533 U.S. 678 (2001) 9, 10, 11

Constitutions and Statutes

U.S. CONST. amend. IV ..... *passim*

U.S. CONST. amend. V ..... *passim*

28 U.S.C. § 1254(1) 1

28 U.S.C. §§ 2671-2680 4

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Filed August 4, 2006 ..... 1a

Appendix B — Order Of The United States District Court For The Western District Of Texas, El Paso Division Filed February 2, 2005 ..... 17a

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Humberto González, respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 459 F.3d 618 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-16a. The order of the district court is not reported in the Federal Supplement but is reprinted in Pet. App. 17a-84a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 4, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ... U.S. CONST. amend. IV.

The Fifth Amendment to the Constitution provides:

No person shall ... be deprived of life, liberty, or property, without due process of law. U.S. CONST. amend. V.

STATEMENT

Introduction. The Fifth Circuit has decided an important issue of constitutional law that conflicts with three previous decisions of this Court holding that aliens do not have certain constitutional rights outside the territory of the United States.

Factual Background. On October 4, 2001 – less than one month after the September 11 terrorist attacks upon the United States – Martínez-Agüero, a citizen of Mexico, attempted to cross into the United States. She was denied admission and entry into the United States because she did not possess a valid border crossing card.

After September 11, 2001, the United States government placed the El Paso ports of entry on high alert and mandated full inspections. This heightened security caused delays in inspection lines and increased pedestrian waiting times by two to three hours. During this period, the El Paso Del Norte Port of Entry experienced assaults on officers, bomb threats, and some riots that even the El Paso Police Department had to help diffuse.

It was in this post-9/11 environment that Officer González was assigned to the El Paso Del Norte Port of Entry as port security for the Immigration and Naturalization Service. The purpose of his assignment was to augment the Federal Protective Services police function. In this capacity, Officer González was a uniformed officer carrying a gun, baton, and handcuffs. He was assigned to secure the safety of the federal facilities, its workers, officers, and the traveling public, and to maintain the integrity of the inspection process. In addition, Officer González advised people with expired

border crossing cards on the procedures to obtain the new "laser visas" required for entry into the country. It was also post-9/11 that the United States began strictly enforcing the requirement for the new laser visa in order to enter the country.

Martínez-Agüero and her aunt were traveling from Juarez to the U.S. Social Security office in El Paso, Texas, to collect her aunt's Social Security check. Martínez-Agüero had previously made this trip with her aunt, on a monthly basis, for the same reason. Martínez-Agüero did not have a new laser visa, so she was denied admission and entry into the country, along with hundreds of other aliens whose border crossing cards had expired. Martínez-Agüero asked to speak to the person in charge. According to Martínez-Agüero, Officer González identified himself as the person in charge and Martínez-Agüero asked why Officer González, "as a Mexican," would not help her. Martínez-Agüero alleged that Officer González snatched her border crossing card away from her and shouted at her with profanity before returning her border crossing card to her.

Because her aunt was unable to proceed without Martínez-Agüero, the two women began returning to Mexico on foot. Martínez-Agüero alleged that Officer González then yelled at her to "stop in the name of the law." Martínez-Agüero further alleged that Officer González grabbed her arms, twisted them behind her back, pushed her into the concrete barrier dividing traffic on the bridge, and began kneeing her in the lower back. Martínez-Agüero was then led into an office and handcuffed to a chair by a different officer, whereupon she claimed to have suffered an epileptic seizure. She was released at 6:00 p.m. Martínez-Agüero claimed she suffered repeated epileptic seizures and regular

back pain, preventing her from walking long distances or performing daily tasks.

Proceedings Below. Martínez-Agüero sued Officer González pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) for false arrest and excessive force under the Fourth and Fifth Amendments. Martínez-Agüero also sued the United States of America under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680. Pet. App. 19a.

Officer González asserted the affirmative defense of qualified immunity in the district court. Pet. App. 17a. Officer González moved for summary judgment on his defense of qualified immunity claiming that Martínez-Agüero, as an alien not admitted or entered into the United States did not have constitutional rights under the Fourth and Fifth Amendments to sustain her *Bivens* action against him. Pet. App. 21a. The district court denied Officer González's motion for summary judgment. Pet. App. 84a. The district court found that Martínez-Agüero had constitutional rights under the Fourth and Fifth Amendments because Martínez-Agüero was in the territory of the United States at the port of entry and because Martínez-Agüero had a substantial connection to the United States. Pet. App. 72a, 84a. Officer González filed an interloeutory appeal from the denial of that motion to the Fifth Circuit.

The Fifth Circuit affirmed the denial of Officer González's motion for summary judgment and remanded the case to the district court. Pet. App. 16a. The Fifth Circuit concluded that aliens stopped at the border have a constitutional right to be free from false imprisonment and

the use of excessive force by law enforcement personnel. Pet. App. 13a.

The Fifth Circuit characterized Officer González's position as one of urging the application of the "entry fiction" doctrine because although Martínez-Agüero was stopped at the border and denied entry into the United States, she was technically in U.S. territory outside the port of entry. Pet. App. 7a. The Fifth Circuit refused to apply the "entry fiction" doctrine based on its prior decision in *Lynch v. Cannatella*, 810 F.2d 1363 (5thCir. 1987), in which it held that the "entry fiction" doctrine only applied to immigration and deportation matters and did not limit the right of excludable aliens detained within United States territory to humane treatment. Pet. App. 8a-10a. In *Lynch*, the Fifth Circuit concluded that "whatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the Fifth and Fourteenth Amendments to be free of gross physical abuse at the hands of state or federal officials." *Lynch*, at 1374. Deciding that the "entry fiction" doctrine did not apply to a challenge to the official use of excessive force, the Fifth Circuit concluded that Martínez-Agüero should receive the Fifth Amendment's protection against the use of excessive force. Pet. App. 9a.

The Fifth Circuit then analyzed whether Martínez-Agüero had standing under the Fourth Amendment to challenge unlawful arrest and the excessive use of force. Pet. App. 13a. Applying the test developed by this Court in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the county," the Fifth Circuit found that Martínez-Agüero had developed substantial

connections with this county and thus earned the protections of the Fourth Amendment. Pet. App. 12a-13a. Specifically, the Fifth Circuit found that Martínez-Agüero's expired border crossing card and application for a new card, and prior monthly visits to the United States with her aunt to help her aunt collect her aunt's Social Security check rose to the level of a substantial connection to the United States to entitle her to protections under the Fourth Amendment. Pet. App. 12a-13a. Apparently, the Fifth Circuit found that Martínez-Agüero's prior acquiescence to the U.S. system of immigration constituted her voluntary acceptance of societal obligations thereby satisfying the substantial connections test. As a result, the Fifth Circuit concluded that Martínez-Agüero could bring a *Bivens* claim for unlawful arrest and the excessive use of force under the Fourth Amendment. Pet. App. 13a-14a. Taking Martínez-Agüero's version of the facts as true, the Fifth Circuit found that Martínez-Agüero presented facts sufficient to survive summary judgment on both claims. Pet. App. 14a. Furthermore, the Court found that the right to constitutional protections were clearly established based on the reasoning in *Lynch* and cases predating *Verdugo-Urquidez* from the Fifth Circuit and others. Pet. App. 15a–16a.

REASONS FOR GRANTING THE PETITION

This Court's review is required to resolve the conflict created by the Fifth Circuit's decision with previous cases from this Court over the existence of constitutional protections afforded aliens. Specifically, a conflict exists as to whether the Fourth and Fifth Amendments apply to an alien who is properly denied admission into the United States, but who is concededly on U.S. territory outside a port of entry.

I. THE FIFTH CIRCUIT'S RULING CONFLICTS WITH DECISIONS OF THIS COURT AND SHOULD BE REVERSED.

A. The Fifth Circuit's Decision is Inconsistent with this Court's Decisions that Provide the Defining Point for the Attachment of Constitutional Rights to Aliens.

In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Supreme Court held that an alien who had no voluntary attachment to the United States had no extraterritorial Fourth Amendment rights. *Id.* at 274-75. In *Verdugo-Urquidez*, Mexican police arrested a Mexican citizen, Verdugo-Urquidez, suspected of smuggling drugs into the United States. *Id.* at 262. The Mexican police transported Verdugo-Urquidez to the United States Border Patrol station in Calexico, California, where United States Marshals arrested him and moved him to a correctional center in San Diego, California. *Id.* at 262. Following the arrest, and while Verdugo-Urquidez was detained in the United States, his residence in Mexico was searched without a warrant. *Id.* Because Verdugo-Urquidez had no voluntary attachment to the United States, the Court found that he did not have protection under the Fourth Amendment. *Id.* at 274-75.

The *Verdugo-Urquidez* Court also established a "substantial connections" test that aliens must meet in order to invoke constitutional rights at all. *See id.* at 271-75. In so holding, the Court distinguished previous cases in which the Court held that aliens enjoy certain constitutional rights. *Id.* at 270-71. According to the Court, those cases "establish only that aliens receive constitutional protections when they

have come within the territory of the United States and developed substantial connections with this country." *Id.* at 271.

The *Verdugo-Urquidez* Court in analyzing the applicability of the Fourth Amendment to aliens recognized that the Court in *Johnson v. Eisentrager* previously rejected the claim that aliens have Fifth Amendment rights. *Id.* at 269. In *Eisentrager*, enemy aliens were arrested in China and imprisoned in Germany after World War II. *Johnson v. Eisentrager,* 339 U.S. 763, 765-66 (1950). They sought writs of habeas corpus pursuant to the Fifth Amendment. *Id.* at 765. The *Verdugo-Urquidez* Court described *Eisentrager's* rejection of extraterritorial application of the Fifth Amendment as "emphatic." *Verdugo-Urquidez*, 494 U.S. at 269. Significantly, the *Eisentrager* Court wrote:

> [A]t least since 1886, we have extended to the person and property of resident aliens important constitutional guarantees – such as the due process of law of the Fourteenth Amendment. *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220. [sic]
>
> But, in extending constitutional protection beyond the citizenry, the Court has been at pains to point out that it was *the alien's presence within its territorial jurisdiction* that gave the Judiciary power to act.

Eisentrager, 339 U.S. at 771 (emphasis added). Thus, with respect to Fourth and Fifth Amendment rights of aliens, there is a territorial distinction between those who have rights and

those who do not have rights. *See id.* The Supreme Court reiterated this territorial distinction in *Zadvydas v. Davis*, 533 U.S. 678 (2001).

In *Zadvydas*, the Court considered a statutory and constitutional challenge to a post removal period detention statute that resulted in indefinite detention of aliens who were ordered removed. *Zadvydas*, 533 U.S. at 682. *Zadvydas* involved two cases in which the government sought to indefinitely detain aliens who were subject to final orders of removal from the country. *Id.* at 684-86. No country would accept either alien upon their deportation. *Id.* Thus, the Court was faced with the issue of whether the aliens, subject to a removal order but whom the government was unable to remove, were to be condemned to an indefinite term of imprisonment within the United States. *Id.* at 695. The Court held that, once removal was no longer reasonably foreseeable, the applicable statute no longer authorized continued detention. *Id.* at 699. The Court found a six-month time frame as a presumptively reasonable period of detention for aliens in such circumstances. *Id.* at 700-01.

In making its argument that alien status itself can justify indefinite detention, the government relied upon *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). In *Mezei*, an alien was excluded from the United States and not allowed to re-enter the country. *Id.* at 208-09. The government sought his indefinite detention at Ellis Island. *Id. Mezei* lost his Fifth Amendment challenge as to his indefinite detention because the "temporary harborage" at Ellis Island did not constitute a "landing." *Id.* at 215. Mezei was "treated as if stopped at the border." *Id.; see also* Zadvydas, 533 U.S. at 693-94. The *Zadvydas* court seized upon this language in the *Mezei* opinion as making "all the difference." *Zadvydas*,

533 U.S. at 693. The Court then cited to its opinions in *Verdugo-Urquidez* (Fourth Amendment) and *Eisentrager* (Fifth Amendment) as it stated: "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders." *Zadvydas*, 533 U.S. at 693. As a consequence, whether the alien was inside the United States or stopped at the border was a critical distinction between *Mezei* and *Zadvydas* for constitutionality purposes. *Id.* at 694; *see also* United States v. Angeles-Mascote, 206 F.3d 529, 531 (5th Cir. 2000) ("This court has previously acknowledged that there is a clear distinction between actual entry into the United States, and attempted entry.") (citing *United States v. Cardenas-Alvarez,* 987 F.2d 1129, 1132-33 (5th Cir. 1993)).

The Fifth Circuit's decision conflicts with this Court's decisions in *Verdugo-Urquidez, Eisentrager,* and *Zadvydas* because it disregarded this Court's defining point for the attachment of constitutional rights to aliens – stopped at the border. Instead, the Fifth Circuit followed its decision in *Lynch v. Cannatella,* 810 F.2d 1363 (5th Cir. 1987), that predates *Verdugo-Urquidez* and *Zadvydas*, in which it held that excludable aliens are entitled to the protection of the due process clause while they are physically in the United States. *Lynch*, 810 F.2d at 1366. However, the aliens in *Lynch* were not subject to the same application of extraterritorial constitutional rights that was dispositive in *Mezei* and further explained in *Zadvydas*. In particular, the stowaway aliens in the *Lynch* opinion were detained by the New Orleans Harbor Police for ten days, where they were forced to perform labor under the threat of denial of food. *Id.* at 1367. *Lynch* is not applicable because the aliens were in the United States for ten days and were not "stopped at the border," the "critical distinction" relied upon in *Mezei*. *Id. See also* Mezei, 345

U.S. at 215; Zadvydas, 533 U.S. at 693. Because Martínez-Agüero was stopped at the border and denied entry and admission into the United States, *Lynch* has no application. In addition, the Fifth Circuit mischaracterized Officer González's reliance on *Mezei* as an application of the "entry fiction" doctrine. Pet. App. 7a. Reliance on the "entry fiction" doctrine was not necessary because Martínez-Agüero was stopped at the border—the precise point beyond which the Supreme Court decisions counsel that constitutional rights attach for aliens.

Had the Fifth Circuit followed *Verdugo-Urquidez*, *Eisentrager*, and *Zadvydas*, it would have found that Martínez-Agüero was not entitled to protection under the Fourth and Fifth Amendments. Martínez-Agüero, an alien with an expired border crossing card, was denied admission and entry into the United States at the port of entry. She was in the zone of territory between the gates of the country and the physical border of U.S. sovereign territory, in the process of returning to Mexico, when the conduct about which she complains took place. Under *Verdugo-Urquidez*, Martínez-Agüero had no Fourth Amendment rights. Under *Eisentrager*, she had no Fifth Amendment rights. Because Martínez-Agüero had no constitutional rights under the Fourth and Fifth Amendments to the U.S. Constitution, her *Bivens* claim failed and Officer González was entitled to qualified immunity. A result that would have been consistent with the *Verdugo-Urquidez* opinion where the Court expressed concern over the effect an extension of rights to aliens outside our borders would have on *Bivens* type claims. *See* Verdugo-Urquidez, 494 U.S. at 273-74.

B. The Fifth Circuit's Application of the Substantial Connections Test is Inconsistent with this Court's Decision in *Verdugo-Urquidez*.

The Fifth Circuit determined that Martínez-Agüero had sufficient connections to the United States to entitle her to constitutional rights. Pet. App. 12a-13a. However, the test applied by the Fifth Circuit is inconsistent with the test articulated in *Verdugo-Urquidez*.

In *Verdugo-Urquidez*, the Court analyzed the text of the Fourth Amendment, historical data, and its prior decisions to determine if the Fourth Amendment applied to aliens outside the geographical limits of the United States. *Verdugo-Urquidez*, 494 U.S. at 261-275. The Court's textual exegesis suggested that the term "the people" referred to a class of people who are part of a national community or who developed sufficient connection with this country:

> [I]t suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

Verdugo-Urquidez, 494 U.S. at 265. The *Verdugo-Urquidez* Court's review of the historical data showed that the Fourth Amendment's purpose was to protect United States citizens from arbitrary governmental action:

> [T]he purpose of the Fourth Amendment was to protect the people of the United States against

> arbitrary action by their own government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.

Id. at 266. Similarly, in reviewing its prior decisions, it found that the Court had rejected the claim that aliens were entitled to Fifth Amendment rights outside the sovereign territory of the United States. *Id.* at 268. Consequently, "if such were true of the Fifth Amendment, which speaks in the relatively universal term of "persons," it would seem even more true with respect to the Fourth Amendment, which applies only to "the people." *Id.* at 269. In contrast, in reviewing decisions in which the Court had previously held that aliens enjoy certain constitutional rights, it distinguished those cases as establishing "only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connection with this country." *Id.* at 271. It emphasized this point by citing to its decision in *Kwong Hai Chew v. Colding,* 344 U.S. 590 (1953), in which the Court stated:

> [T]he Bill of Rights is a futile authority for the alien seeking admission for the first time to those shores. *But once an alien lawfully enters and resides in this country* he becomes invested with the rights guaranteed by the constitution to all people within our borders.

Verdugo-Urquidez, 494 U.S. at 271 (citing *Kwong Hai Chew v. Colding,* 344 U.S. 590, 596, n. 5. (1953)). The *Verdugo-Urquidez* Court also distinguished its decision in *INS v. Lopez-Mendoza,* 468 U.S. 1032 (1984), where a majority of

Justices assumed that the Fourth Amendment applied to illegal aliens in the United States by saying that "[o]ur statements in *Lopez-Mendoza* are therefore not dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States if such a claim were squarely before us." *Verdugo-Urquidez*, at 272. The difference was that the illegal aliens in *Lopez-Mendoza* were in the United States voluntarily and presumably had accepted some societal obligations. *Id.* at 273.

In light of its textual, historical, and precedential analysis, the *Verdugo-Urquidez* Court rejected the application of the Fourth Amendment to a citizen and resident of Mexico, because at the time of the search the alien had no voluntary attachment to the United States and the place searched was in Mexico. *Id.* at 275–276. The Fifth Circuit, however, in spite of the *Verdugo-Urquidez* Court's lengthy analysis and guidance, determined that the nature and duration of Martínez-Agüero's contacts with the United States were sufficient to confer Fourth Amendment rights upon her. Pet. App. 13a. In so holding, the Fifth Circuit described the operative test as "aliens with substantial connections are those who are in this country "voluntarily and presumably [have] accepted some societal obligations." Pet. App. 12a. In applying that test, the Fifth Circuit found Martínez-Agüero's past regular and lawful entry of the United States pursuant to a once valid border crossing card and her acquiescence to the U.S. system of immigration constituted voluntary acceptance of societal obligations, rising to the level of substantial connections. Pet. App. 12a. It appears that the Fifth Circuit presumed Martínez-Agüero had accepted some societal obligations. Pet. App. 12a. Certainly, none were cited by the Fifth Circuit in its opinion.

The Fifth Circuit incorrectly applied the substantial connections test to Martínez-Agüero. It found that Martínez-Agüero had a substantial connnection to the United States because she had previously entered the United States with a valid border crossing card on a regular basis. Pet. App. 13a. However, the Fifth Circuit disregarded the fact that Martínez-Agüero's border crossing card had since expired. Pet. App. 12a-13a. Martínez-Agüero's immigration status was no different then that of an alien reaching the country's gates for the first time. Consequently, the Fifth Circuit should have given no weight to Martínez-Agüero's past activity in the United States or license or permit to enter the United States because her border crossing card had expired. Therefore, Martínez-Agüero could not prove either prong of the substantial connections test. First, she was stopped at the border, and denied admission and entry into the United States, outside the port of entry. Second, she had no significant voluntary connection to the United States and had not accepted some societal obligations because her border crossing card had expired and could not enter the country. If the Fifth Circuit had properly applied the test, it would have found Martínez-Agüero was not entitled to the constitutional protections under the Fourth and Fifth Amendments.

II. LOWER COURT CONFUSION OVER *VERDUGO-URQUIDEZ'S* PRECEDENTIAL VALUE AND APPLICATION OF THE SUBSTANTIAL CONNECTIONS TEST COMPELS REVIEW.

As noted by the Fifth Circuit, since this Court issued its decision in *Verdugo-Urquidez,* courts have split on the decision's precedential value because it is uncertain how this Court intended the "substantial connections" test to be

applied. Pet. App. 11a-13a; *Verdugo-Urquidez*, 494 U.S. at 270-272. According to the Fifth Circuit, this Court seemingly reserved the question whether illegal aliens would have Fourth Amendment rights on U.S. soil. Pet. App. 15a. The confusion over the decision's precedential value appears to be caused by Justice Kennedy's specially concurring opinion in which he joined the majority opinion in full, but with some disagreement with the Court's textual analysis of the term "the people" in the Fourth Amendment. *Verdugo-Urquidez*, 494 U.S. at 276.

For instance, the United States District Court for the Northern District of California concluded that Justice Kennedy "in his separate concurrence, disputed in large part, the analysis presented in the 'majority' opinion, particularly with respect to whether the Fourth Amendment protects illegal aliens." *United States v. Guiterrez*, 983 F.Supp. 905, 913 n. 7 (N.D. Ca. 1998) *rev'd on other grounds*, 203 F.3d 833 (9th Cir. 1999). In addition, the United States District Court of Colorado determined that aliens could assert coverage under the Fourth Amendment because "[t]he broad language of the Chief Justice was not required for the holding." *United States v. Iribe*, 806 F.Supp. 917, 919 (D. Colo. 1992). Moreover, the district court in the proceedings below found that "there is a substantial question as to whether the definition of 'the people' is binding as a majority decision of the Supreme Court or merely persuasive authority by virtue of its characterization as a plurality decision." Pet. App. 28a-29a (citing *Lamont v. Woods*, 948 F.2d 825, 835 & n.7 (2d Cir. 1991); Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U.L. REV. 667, 681 (2003); Gerald Newman, *Whose Constitution?*, 100 YALE L.J. 909, 972 (1991)).

Because of the confusion over the precedential value of this Court's decision, lower courts have struggled with the application of the substantial connections test and its application to aliens. As explained above, the Fifth Circuit viewed the test as aliens who are in this country "voluntarily" and presumably [have] accepted some societal obligations." Pet. App. 12a. However, other courts have applied the test differently.

In *United States v. Barona*, 56 F.3d 1089 (9th Cir. 1995) the Ninth Circuit reviewed the criminal convictions of six persons for an ongoing conspiracy to distribute cocaine. *Barona*, 56 F.3d at 1090. There, the Ninth Circuit had to determine if an exception to the exclusionary rule of the Fourth Amendment applied to the defendants. *Id.* Because three of the defendants were not U.S. citizens, the Ninth Circuit concluded those individuals had to first show that they were among the class of persons the Fourth Amendment was meant to protect. *Id.* at 1093. Although ultimately the Ninth Circuit concluded that it did not have to reach that question based on other grounds, it appears from the Ninth Circuit's analysis that its decision would have conflicted with the Fifth Circuit's decision below because it found that an alien's rights depended on the extent of social obligations accepted and that full constitutional rights were unavailable until the complete range of societal obligations were met. *Id.* at 1093-1094. The Ninth Circuit underscored that it had yet to be decided "whether a resident alien has undertaken sufficient obligations of citizenship or has 'otherwise developed sufficient connection with this country' . . . to be considered one of 'the people.'" *Id.* at 1094. As a result, the Ninth Circuit was unable to determine if the three non-citizen defendants in that case were entitled to receive Fourth Amendment protection whatsoever. *Id.* Because the Ninth

Circuit found the law unclear whether even a resident alien has undertaken sufficient obligations of citizenship or has otherwise developed substantial connections to be considered one of "the people" protected by the Fourth Amendment, it appears it would have found that an alien with an expired border crossing card would not be protected by the Fourth Amendment. As a result, there is an apparent conflict with the Fifth Circuit's decision below, where the Fifth Circuit held an expired border crossing card did establish such requisite connection.

The tension created by the Fifth Circuit decision is further exemplified by a decision affirmed by the Tenth Circuit, *United States v. Esparza-Mendoza*, in which the district court found that an alien felon who had been deported and reentered the United States illegally was not part of the "people" to whom the Fourth Amendment protected. *United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254 (N.D. Utah 2003). In *Esparza-Mendoza*, a Mexican national charged with illegal reentry moved to suppress evidence obtained after he was allegedly unlawfully detained. *Id.* at 1256-1257. *Esparza-Mendoza* sought to suppress his identification card and, as the fruit of that card, his identity and all information related to his prior deportation. *Id.* He argued that he was detained and forced to present his identification without probable cause or even reasonable suspicion. *Id.* The government responded that previously removed alien felons could not raise Fourth Amendment challenges. *Id.* at 1257. In determining that issue, the district court reviewed prior Supreme Court precedent, including *Verdugo-Urquidez,* and the constitution's text, history, and structure. *Id.* at 1257-1272. It noted the application of the Fourth Amendment to previously removed aliens appeared to be unresolved in both the Supreme Court and the Tenth Circuit. *Id.* at 1259.

However, based on *Verdugo-Urquidez* it appeared to the district court that the issue was whether *Esparza-Mendoza* was "part of a national community" or otherwise had "developed sufficient connection with this country to be considered part of that community." *Id.* at 1260.

After conducting its own analysis of the Fourth Amendment, the district court found that those who are "excluded" from the country could not assert Fourth Amendment rights, but those who are "included" – that is, who are "citizens or otherwise" connected to the country – are covered by the Fourth Amendment. *Id.* at 1266. Recognizing that tourists from overseas and legally resident aliens appear to be prime candidates for inclusion under a sufficient connection test, the district court ultimately decided that previously deported alien felons did not. *Id.* at 1267-1274; *cf.* United States v. Tehrani, 826 F. Supp. 789, 793 n.1 (D.Vt. 1993) (aliens who "gained admission, albeit surreptitiously, for a temporary visit as tourists . . . constitute the type of substantial connections which would vest in aliens the protections afforded by the Fourth Amendment."). Although finding that *Esparza-Mendoza* was entitled to some rights by virtue of his mere presence in this country, he lacked entitlement to those rights which come from being a member of American society – including the Fourth Amendment. *Id* at. 1271. As a result, the district court found *Esparza-Mendoza* was not entitled to the protection of the Fourth Amendment. *Id.* at 1271-1274. That decision was affirmed on appeal to the Tenth Circuit without reaching the substantial connections issue. *United States v. Esparza-Mendoza,* 386 F.3d 953 (10th Cir. 2004).

The decision of the district court in *Esparza-Mendoza* is in tension with the Fifth Circuit's decision below because

the district court refused to find that a deported alien felon had any connection to the United States whereas the Fifth Circuit found that *Martínez-Agüero's* lack of status (an expired border card and pending application for a new card) was a substantial connection to the United States. Had the Fifth Circuit followed the logic in *Esparza-Mendoza,* it too would have found the *Martínez-Agüero* was not entitled to constitutional rights under the Fourth and Fifth Amendments. Because of the apparent confusion over the precedential value of this Court's decision in *Verdugo-Urquidez* and the application of the substantial connections test by lower courts, review by this Court is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 4, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-50472.

MARIA ANTONIETA MARTINEZ-AGUERO,

Plaintiff-Appellee,

v.

HUMBERTO GONZALEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas.

Before SMITH, WIENER, and STEWART, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

We must decide whether aliens stopped at the border have a constitutional right to be free from false imprisonment and the use of excessive force by law enforcement personnel. Concluding that they do, we affirm the denial of Humberto Gonzalez's motion for summary judgment that he pursued on the basis of a claim of qualified immunity, and we remand for further proceedings.

Appendix A

I.

On interlocutory appeal of the denial of a summary judgment motion seeking dismissal for qualified immunity, we review the facts in the light most favorable to the plaintiff. *Kinney v. Weaver,* 367 F.3d 337, 348 (5th Cir. 2004) (en banc) (citing *Wagner v. Bay City,* 227 F.3d 316, 320 (5th Cir. 2000)). Those facts are as follows:

Plaintiff Maria Martinez-Aguero is a forty-nine-year-old citizen and resident of Mexico who visits the United States once a month to accompany her aunt to the El Paso Social Security office. Though she normally enters the country using a valid border-crossing card (which is the same thing as a visitor visa), her card had become invalid when the former Immigration and Naturalization Service decided to issue biometric, machine-readable cards for increased security. On July 3, 2001, Martinez-Aguero went with her aunt and mother to the U.S. consular office to apply for new cards and asked how she could legally enter the United States while waiting for the cards to arrive in the mail. Officials told her she could get a stamp on her old cards that would allow her to travel in the interim. For the next three months she used the stamped card to cross the border without incident.

On October 4, Martinez-Aguero and her aunt made their usual bus trip to El Paso. United States immigration officials stopped the bus within the zone outside the port of entry but within the territorial United States. Gonzalez, an INS border patrol agent, ordered Martinez-Aguero and her aunt off the bus and requested to see their documents. He told Martinez-Aguero that her visa had expired, so she could not enter the country.

Appendix A

Martinez-Aguero asked to speak to someone in authority, and Gonzalez replied in Spanish, "I am in charge!" Martinez-Aguero asked him why he would not help her, because he also was Mexican. This agitated Gonzalez, who pointed to patches on his uniform and shouted, "Look at me! I am not a Mexican! Look at my uniform!" He then yelled profanities at them in Spanish and threw their visas to the ground.

Martinez-Aguero picked her visa up and made a sarcastic remark to her aunt about Gonzalez's bad language, which he apparently overheard. She and her aunt began walking back in the direction of Mexico when Gonzalez yelled, "Stop in the name of the law!"

Martinez-Aguero alleges in her affidavit that Gonzalez then "grabbed [her] arms, twisted them behind [her] back, pushed her into a concrete barrier, which hit [her] in the stomach ... [and] then started kicking [her] with his knees in [her] lower back." Another agent then took Martinez-Aguero into an office and handcuffed her to a chair. Gonzalez allegedly came in and showed her scratches on his arms and told her that he was going to claim that she cut him with her fingernails.

Shortly thereafter, Martinez-Aguero, who is epileptic, suffered a seizure while still handcuffed to the chair. She was given oxygen, and when she recovered she was questioned by officials before being permitted to leave. She suffered another seizure after arriving home and was taken to the hospital. She claims she now suffers from recurrent seizures (before the beating she had not suffered a seizure for 17 years), memory problems, back injuries, and continual

pain. She alleges she cannot walk long distances or adequately clean her house anymore.

II.

Martinez-Aguero sued Gonzalez for assault, battery, and false arrest under the Federal Tort Claims Act and for false arrest and excessive use of force under the Fourth and Fifth Amendments. Gonzalez moved for summary judgment, asserting qualified immunity. The district court denied the motion, and Gonzalez filed an interlocutory appeal.

III.

Our standard of review for interlocutory appeals differs from the usual Federal Rule of Civil Procedure 56 standards for summary judgment. We lack jurisdiction to review the district court's finding that no genuine issue of material fact exists; rather, we "consider only whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment." *Kinney,* 367 F.3d at 348. If the interlocutory appeal concerns summary judgment on a defense of qualified immunity, we must view the facts in the light most favorable to the plaintiff. *See id.* (citing *Wagner v. Bay City,* 227 F.3d 316, 320 (5th Cir. 2000)). Our review of the legal significance of the facts is *de novo. See id.* at 349.

IV.

We use a two-part test to determine whether an officer is entitled to qualified immunity: first, do the facts alleged show that he has violated plaintiff's constitutional rights, *see Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); second, were the rights clearly established at the time of the alleged violation? *See id.* To determine whether a right is clearly established, we ask "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*

The only claims relevant to this appeal are Martinez-Aguero's *Bivens* actions under the Fourth and Fifth Amendments.[1] Specifically, she alleges wrongful arrest under the Fourth Amendment and excessive force under the Fourth and Fifth Amendments. We must determine whether (1) Martinez-Aguero is entitled to the protection of these constitutional guarantees, (2) the facts she alleges would suffice to show that Gonzalez violated her rights, and (3) the rights were clearly established at the time of the incident.

A.

Gonzalez argues that Martinez-Aguero had no constitutional rights at the time of the alleged incident

1. "Under *Bivens* a person may sue a federal agent for money damages when the federal agent has allegedly violated that person's constitutional rights." *Brown v. Nationsbank Corp.*, 188 F.3d 579, 590 (5th Cir. 1999) (citing *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)). Martinez-Aguero also sued the United States under the Federal Tort Claims Act.

because she was an alien who attempted to enter the country illegally and was not admitted. Gonzalez relies on *United States v. Verdugo-Urquidez,* 494 U.S. 259, 274-75, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990), which held that an alien who has no voluntary attachment to the United States enjoys no extraterritorial Fourth Amendment protection.[2] The Court in *Verdugo-Urquidez* analyzed the text and history of the phrase "the People" in the Fourth Amendment and concluded that it "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 265, 110 S.Ct. 1056. The Court acknowledged that it had held that aliens enjoy certain constitutional rights, but those cases "establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country."[3] Gonzalez also relies on *Johnson v. Eisentrager,* 339 U.S. 763, 765-66, 70 S.Ct. 936, 94 L.Ed. 1255 (1950), in which the Court rejected the extraterritorial application of the Fifth Amendment.

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2. Specifically, the defendant in *Verdugo-Urquidez* was detained in a correctional facility in California while federal agents searched his residence in Mexico without a warrant. *See Verdugo-Urquidez,* 494 U.S. at 262, 110 S.Ct. 1056.

3. *Id.* at 271, 110 S.Ct. 1056 (citing *Plyler v. Doe,* 457 U.S. 202, 212, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (stating that provisions of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction"); *Kwong Hai Chew v. Colding,* 344 U.S. 590, 596, 73 S.Ct. 472, 97 L.Ed. 576 (1953) (opining that "once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders").

The crucial distinction is "that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders." *Zadvydas v. Davis,* 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). The Court in *Zadvydas* reasoned that a statute that authorized the indefinite detention of removable aliens present in the U.S. would pose serious constitutional problems. *See id.* at 682, 121 S.Ct. 2491. The Court distinguished *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953), which held that a lawfully admitted alien who left the country and was denied reentry for security reasons could be indefinitely detained at Ellis Island. The "critical" difference for the Court was that the alien in *Mezei* never reentered the United States; "[h]ence, he was treated, for constitutional purposes, as if stopped at the border." *See Zadvydas,* 533 U.S. at 693, 121 S.Ct. 2491.[4]

This doctrine is called the "entry fiction," and Gonzalez urges its application to this case: Because Martinez-Aguero was denied entry into the United States, and because the fiction requires us to treat her as if stopped at the border (even though she was technically present in U.S. territory), and because the Fourth and Fifth Amendments have no

4. In *United States v. Angeles-Mascote,* 206 F.3d 529, 531 (5th Cir. 2000), this court made a plain distinction between actual entry into the United States and attempted entry, in the context of interpreting a grand jury indictment: "'[A]ctual entry' has been found by most courts to require both physical presence in the country as well as freedom from official restraint, while 'attempted entry' only requires that the person approach a port of entry and make a false claim of citizenship or non-resident alien status."

extraterritorial application, Gonzalez contends he should be entitled to qualified immunity.

We disagree. This conclusion is inconsistent with *Lynch v. Cannatella,* 810 F.2d 1363 (5th Cir. 1987), in which we specifically limited the application of the "entry fiction" to immigration and deportation matters:

> The "entry fiction" that excludable aliens are to be treated as if detained at the border despite their physical presence in the United States determines the aliens' rights with regard to immigration and deportation proceedings. It does not limit the right of excludable aliens detained within United States territory to humane treatment.

Id. at 1373.

We reasoned in *Lynch* that the sovereign should enjoy particularly broad discretion in the immigration context, because the power to decide which, and how many, outsiders may join our society is critical to national self-determination. *See id.* There are, however, no identifiable national interests that justify the wanton infliction of pain. *See id.* at 1373-74. We concluded that "whatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials." *Id.* at 1374.

Gonzalez distinguishes *Lynch* because the aliens there were detained for ten days, but Martinez-Aguero was

detained for only about six hours. This distinction fails, however, because Mezei (the alien detained at Ellis Island) was held captive for twenty-one months. *See Mezei,* 345 U.S. at 209, 73 S.Ct. 625. The operative distinction between *Lynch* and *Mezei* is that Mezei brought a due process challenge to his exclusion proceeding, but Lynch challenged the official use of excessive force. The "entry fiction" applies to the former claim but not the latter. Because the "entry fiction" does not bar Martinez-Aguero's suit, and because she was concededly within the territorial jurisdiction of the U.S. (though outside the port of entry) when the alleged incident occurred, *Lynch* counsels that she should receive the Fifth Amendment's protection against the use of excessive force.

In *Graham v. Connor,* 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), however, the Court held that "*all* claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." The Court reasoned that because "the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.*

Graham does not call into question the part of *Lynch* that limits the applicability of the "entry fiction" to the context of immigration and deportation proceedings. Instead, it merely locates the right to be free from excessive use of

force in the express textual guarantees of the Fourth Amendment. *Graham* does, however, require us to analyze Martinez-Aguero's excessive force claim, first and foremost, as a claim alleging an unreasonable seizure under that amendment.[5] We turn now to whether she has standing under the Fourth Amendment to challenge unlawful arrest and the excessive use of force.

In pre- *Verdugo-Urquidez* cases, the Supreme Court had assumed, and we have explicitly held, that the Fourth Amendment applies to aliens.[6] Martinez-Aguero argues that

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5. Because the Fourth Amendment applies to Martinez-Aguero, we need not decide whether the due process protection embodied in *Lynch* continues to apply of its own force to a case where the protection of the Fourth Amendment is unavailable. We note, however, that because *Graham* by its own terms, 490 U.S. at 395, 109 S.Ct. 1865, applies only to "free citizens," whereas *Lynch*, 810 F.2d at 1373, applies to all "excludable aliens detained within United States territory," *Lynch* may sweep more broadly than does the Fourth Amendment guarantee.

6. *See, e.g., Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973) (stating that a Mexican citizen was entitled to Fourth Amendment protection under statute that purports to authorize warrantless searches within a reasonable distance from the U.S. border); *United States v. Cortes*, 588 F.2d 106, 110 (5th Cir. 1979) ("Once aliens become subject to liability under United States law, they also have the right to benefit from [Fourth Amendment] protection."); *United States v. Cruz*, 581 F.2d 535, 537 (5th Cir. 1978) (en banc), *overruled on other grounds by United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987) (stating that law enforcement "must . . . be performed with due regard to the Fourth Amendment to the Constitution, which affords citizen and

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the definition of "the People" in *Verdugo-Urquidez*, seemingly limiting the class of aliens that deserve protection to those with "substantial connections" to the United States, is not binding, because Justice Kennedy, though joining the majority opinion in full, specially concurred to express disagreement with the majority's textual analysis.

Justice Kennedy appeared to indicate that the key factor in his decision was the extraterritorial application of the Fourth Amendment: "If the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply." *Verdugo*, 494 U.S. at 278, 110 S.Ct. 1056 (Kennedy, J., concurring). Justice Kennedy's formulation would be favorable to Martinez-Aguero, because he appears to believe that the Fourth Amendment's protection is coextensive with U.S. territorial boundaries.

If, however, we take at face value the fact that Justice Kennedy joined the opinion of the Court, *see Verdugo*, 494 U.S. at 275, 110 S.Ct. 1056, there are five votes for the proposition that "aliens receive constitutional protections when they have come within the territory of the United States *and* developed substantial connections with the country."

(Cont'd)

alien alike protection against illegal stops, searches, and arrests"); *United States v. Cadena*, 585 F.2d 1252, 1262 (5th Cir. 1978), *overruled on other grounds by United States v. Michelena-Orovio*, 719 F.2d 738 (5th Cir. 1983) (observing that "once we subject . . . aliens to criminal prosecution, they are entitled to the equal protection of all our laws, including the Fourth Amendment").

Id. at 271, 110 S.Ct. 1056 (emphasis added).[7] We need not decide whether *Verdugo-Urquidez* is controlling, because even under the more demanding test, Martinez-Aguero has "developed substantial connections with the country" and earned the protection of the Fourth Amendment.

Gonzalez contends that Martinez-Aguero lacked "substantial connections" with the United States because, besides having an expired visa and applying for a new one, her only connection consisted of periodic visits to assist her aunt with retrieving her Social Security check. Gonzalez cites *Am. Immigration Lawyers Ass'n v. Reno,* 18 F.Supp.2d 38, 60 & n. 17 (D.D.C. 1998), which held that regular visits to family members do not qualify as "substantial connections." On the contrary, Martinez-Aguero cites language in *Verdugo-Urquidez,* 494 U.S. at 273, 110 S.Ct. 1056, suggesting that aliens with substantial connections are those who are in this country "voluntarily and presumably [have] accepted some societal obligations." She argues that her regular and lawful entry of the United States pursuant to a valid border-crossing card[8] and her acquiescence in the U.S. system of immigration

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7. *See also United States v. Emerson,* 270 F.3d 203, 228 (5th Cir. 2001) (citing favorably the definition of the principal *Verdugo* opinion in the course of holding that the phrase "the people" as used in the Second Amendment confers a personal right to bear arms).

8. Though Martinez-Aguero arguably did not have a valid border-crossing card the day she was arrested, she reasonably relied on the statements of officials at the U.S. consular office that her stamped, expired card would suffice. *See Raley v. Ohio,* 360 U.S. 423, 426, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959) (holding that

(Cont'd)

constitute her voluntary acceptance of societal obligations, rising to the level of "substantial connections."[9]

Martinez-Aguero is correct. There may be cases in which an alien's connection with the United States is so tenuous that he cannot reasonably expect the protection of its constitutional guarantees; the nature and duration of Martinez-Aguero's contacts with the United States, however, are sufficient to confer Fourth Amendment rights. It follows that she may bring a *Bivens* claim for unlawful arrest and the excessive use of force under the Fourth Amendment.

B.

Because Martinez-Aguero is entitled to Fourth Amendment protection, it is obvious that she has alleged facts that, if true, would establish that Gonzalez violated those rights. As to false arrest, Gonzalez arrested Martinez-Aguero pursuant to 18 U.S.C. § 111, which reads as follows: "Whoever ... forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person ... while engaged in or on account of the performance of official duties ... shall ... be fined under this title or imprisoned not more than one year, or both[.]"

(Cont'd)

"convicting a citizen for exercising a privilege which the State had clearly told him was available to him" would be "to sanction an indefensible sort of entrapment by the State").

9. *Cf. United States v. Tehrani,* 826 F.Supp. 789, 793 n. 1 (D.Vt. 1993) (holding that defendants voluntarily gaining admission to the United States for a temporary visit as tourists qualified as "substantial connections").

Appendix A

Under the Fourth Amendment, an arrest is reasonable if supported by probable cause. *See Atwater v. City of Lago Vista,* 195 F.3d 242, 244 (5th Cir. 1999) (en banc). We define probable cause as "reasonable ground for belief . . . supported by less than prima facie proof but more than mere suspicion." *United States v. One 1978 Chevrolet Impala,* 614 F.2d 983, 984 (5th Cir. 1980). Taking her version of the facts as true, we must conclude that Martinez-Aguero did nothing to interfere with Gonzalez's official duties; rather, the arrest was entirely without provocation. As the district court concluded, "[a]ny argument to the contrary would be patently absurd."

This reasoning applies with equal force to Martinez-Aguero's claim of excessive force. In *Graham,* 490 U.S. at 396, 109 S.Ct. 1865, the reasonableness of official use of force turns on "a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." The relevant factors include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

Again, Martinez-Aguero plainly prevails under the facts she presents. She alleges that she was entirely docile and compliant (with the exception of one stray remark not intended for Gonzalez to hear); therefore, there could be no state interest in subduing her using force. In short, she has presented facts sufficient to survive summary judgment on both claims.

C.

Finally, we must determine whether Martinez-Aguero's rights were "clearly established" at the time of the incident. She contends that Gonzalez has waived any right to make this argument. Indeed, the issue that Gonzalez presents on appeal, as described and discussed in his brief, deals exclusively with the question whether aliens enjoy Fourth or Fifth Amendment protection at all. The words "clearly established" appear precisely once, when Gonzalez states the test for qualified immunity. Because, however, one could read Gonzalez's argument that the relevant cases do not support *any* constitutional protections for Martinez-Aguero as implicitly containing the lesser argument that the protections are not clearly established, we therefore consider the issue on the merits.

Gonzalez could argue that Martinez-Aguero's Fourth Amendment rights were not clearly established because courts have split on the precedential value of *Verdugo-Urquidez;* because it is uncertain how the Court intended the "substantial connections" test to be applied; and because the Court seemed explicitly to reserve the question whether illegal aliens would have Fourth Amendment rights on U.S. soil.[10] But, decisions pre-dating *Verdugo-Urquidez,* including cases from this circuit, state unequivocally that aliens are entitled to Fourth Amendment protection.[11]

10. *Verdugo-Urquidez,* 494 U.S. at 272, 110 S.Ct. 1056 (stating that *dicta* in a previous case are "not dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States if such a claim were squarely before us").

11. *See supra* n. 6 and accompanying text.

Also, the inquiry into whether rights are clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151. If Martinez-Aguero deserves any Fourth Amendment or due process protection at all, it surely must extend to the right to be free of entirely meritless arrests and the excessive use of force. *Lynch* plainly confers on aliens in disputes with border agents a right to be free from excessive force, and no reasonable officer would believe it proper to beat a defenseless alien without provocation, as Martinez-Aguero alleges.

The logic of *Lynch* applies equally to arresting an alien without cause: "Counsel has not suggested and we cannot conceive of any national interests that would justify [the practice] simply because that person is an excludable alien." *Lynch,* 810 F.2d at 1374. This reasoning is particularly compelling when an alien has made a good-faith effort to comply with federal requirements for obtaining a temporary visa and has made frequent use of a border-crossing card to visit the country in the past. On these facts, no officer would reasonably conclude that Martinez-Aguero lacked protection against suspicionless arrest.

We AFFIRM the denial of summary judgment, and REMAND to the district court for further proceedings.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION FILED FEBRUARY 2, 2005

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS EL PASO DIVISION

Civil No. EP-03-CA-411(KC)

MARIA ANTONIETA MARTINEZ-AGUERO,

Plaintiff,

v.

HUMBERTO GONZALEZ and UNITED STATES OF AMERICA,

Defendants.

ORDER

Defendant Humberto Gonzalez (hereafter "defendant") moves for summary judgment on his defense of qualified immunity. For the reasons set forth herein, defendant's motion is **denied.**

I. BACKGROUND

The present complaint arises from an altercation between plaintiff, a citizen of Mexico, and defendant, a Border Patrol Agent, at the Paso del Norte International Bridge on or about

October 4, 2001. Defendant allegedly questioned plaintiff about the validity of her visa then, without reason to do so, arrested her for interfering with and disrupting official business at a port of entry in violation of 18 U.S.C. § 111 and 41 C.F.R. § 102-74.390. In the process of arresting plaintiff, defendant grabbed her, pulled her arms behind her back, shoved her against a wall and hit her with his knees and fists.[1]

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1. Plaintiff states in her affidavit that she suffered an epileptic seizure while handcuffed to a table in an interrogation room as a result of the arrest and has suffered from frequent epileptic seizures since the date of the arrest and had not suffered an epileptic seizure for approximately seventeen years. Defendant in its reply argues that this testimony should be stricken as plaintiff is not competent to provide medical testimony about her condition. "Supporting and opposing affidavits shall [1] be made on personal knowledge, [2] shall set forth such facts as would be admissible in evidence, and [3] shall show affirmatively that the affiant is competent to testify to the matters stated therein." FED. R. CIV. P. 56(e); *see also Broadway v. City of Montgomery,* 530 F.2d 657, 661 (5th Cir. 1976) ("[e]vidence inadmissible at trial cannot be used to avoid summary judgment"). While the relevant concern in reviewing the merits of plaintiff's claims is the amount of force used by defendant and not the damage resulting from the force used, and certainly the degree of damage may assist in measuring force used, this Court is not inclined to strike the references to epileptic seizures *en toto.* Testimony pertaining to subjective symptoms, including anything that may be detected by the senses, is clearly admissible and would be a matter known personally to plaintiff. *Townsend v. Benya,* 287 F. Supp.2d 868, 875 (N.D.Ill. Oct. 14, 2003). This Court is less inclined to accept as admissible evidence plaintiff's declaration that the force of the arrest triggered an epileptic seizure and resulted in seizures of a greater frequency that she had previously experienced. Neither

(Cont'd)

Appendix B

Plaintiff claims that defendant's conduct constitutes assault, battery and false arrest under the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), §§ 2671-2680, and a violation of her rights under the First,[2] Fourth and Fifth Amendment of the United States Constitution raised pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

II. DISCUSSION

Defendant moves for summary judgment on his asserted defenses of qualified immunity. Plaintiff responds that genuine issues of material fact preclude summary judgment.

(Cont'd)

plaintiff nor her aunt are medical experts per Federal Rule of Evidence 702, and while plaintiff may have personal knowledge of her condition as a result of a prior medical evaluation, she is not competent to make a causation analysis that would require expert knowledge. *Holt v. Olmsted Tp. Bd. of Trustees*, 43 F. Supp.2d 812, 819-20 (N.D. Ohio Sept.18, 1998) (discussing inappropriate lay testimony used in causation analysis). As plaintiff refers to a degree of pain resulting from the force used in her arrest, her statements will be construed as limited to that declaration and shall not be ordered stricken.

2. Plaintiff states that she "is no longer pursuing a First Amendment claim." Resp. Mot. Summ. J. at 2 n.5. Such is construed as conceding the merits of defendant's motion for summary judgment on the alleged violation of her First Amendment rights. Summary judgment is therefore granted on the First Amendment claim.

Appendix B

A. Standard of Review

A party moving for summary judgment must establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a genuine issue has been raised, all ambiguities are resolved and all reasonable inferences are drawn against the moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *S & W Enters. v. Southtrust Bank*, 315 F.3d 533, 537 (5th Cir. 2003). Summary judgment is proper when reasonable minds could not differ as to the import of evidence. *Anderson*, 477 U.S. at 251. The weight of evidence and the credibility of witnesses are not proper considerations in deciding a motion for summary judgment as such determinations are exclusively the province of the jury. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998).

B. Qualified Immunity

Qualified immunity shields a government official from liability arising from the performance of discretionary functions. *Beltran v. City of El Paso*, 367 F.3d 299, 302-303 (5th Cir. 2004). A government official establishes an entitlement to qualified immunity by showing (1) that the conduct occurred while he or she was acting in his official capacity and (2) such action was within the scope of his or her discretionary authority. *Id.* at 303. Once qualified immunity has been properly invoked, plaintiff must show that the defense does not apply. *Id.* Determinations as to the

applicability of qualified immunity require that this Court ask whether the plaintiff can support a violation of a federal constitutional or statutory right. *Id.* If plaintiff fails to factually support such a violation, the qualified immunity inquiry ends. Should plaintiff provide facts supporting a violation, the inquiry proceeds to whether the government official's conduct was objectively reasonable in light of clearly established legal rules existing at the time of the alleged violation. *Id.*

There appears to be no dispute in the present case as to whether defendant was acting in his official capacity at the time of the shooting, whether his actions were within the scope of his discretionary authority or whether defendant has properly invoked the defense. As the defense of qualified immunity is claim-specific, *Iacobucci v. Boulter,* 193 F.3d 14, 22 (1st Cir. 1999), this Court will discuss the following arguments seriatim: (1) plaintiff under the entry fiction is not afforded rights under the Fourth and Fifth Amendments, (2) plaintiff as an alien is not entitled to the protections of the Fourth Amendment against wrongful arrest or the use excessive of force in arrest and otherwise on the facts cannot substantiate such claims and (3) plaintiff as an alien is not entitled to the protections of the Fifth Amendment.

C. Entry Fiction

Defendant first argues that plaintiff cannot establish a violation of a constitutional right given her status as an alien who had not gained entry into the United States. Defendant relies on *United States v. Verdugo-Urquidez,* 494 U.S. 259 (1990), as supporting his argument that "[a]s a non-resident

alien, who had not gained admission or entry to the United States, she was not entitled to the protections of the First, Fourth, and Fifth Amendments," Mot. Summ. J. at 6.

This argument reflects a merging of two separate legal analyses, the first involving the rights of aliens located outside the territory of the United States and the second involving the "entry fiction," by which "excludable aliens are to be treated as if detained at the border despite their physical presence in the United States," *Gisbert v. U.S. Att'y Gen.*, 988 F.2d 1437, 1442 (5th Cir. 1993); *Lynch v. Cannatella*, 810 F.2d 1363, 1370 (5th Cir. 1987) (stating "stowaways are legally considered detained at the border . . . even if they are physically present in the United States"); *see also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) ("an alien who seeks admission to this country may not do so under any claim of right"). The two analyses reflect separate concerns and are not susceptible to merger into a single analysis in the manner proposed by defendant. As such, this Court will summarily dispose of defendant's entry fiction argument and focus on the more complex question of whether the individual rights invoked have application to an alien under the circumstances of the present case.

The entry fiction limits certain rights to those aliens located within the sovereign territory of the United States but who are denied admission under existing immigration law. Inasmuch as an alien denied admission is not entitled to full array of rights to which a citizen may be entitled, *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) ("[t]he alien, to whom the United States has been traditionally hospitable,

has been accorded a generous and ascending scale of rights as he increases his identity with our society"); *id.* at 771 ("in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act"), the application of the entry fiction is limited to an alien's rights in immigration proceedings and does not otherwise constitute an absolute bar on constitutional rights.

> The "entry fiction" that excludable aliens are to be treated as if detained at the border despite their physical presence in the United States determines the aliens' rights *with regard to immigration and deportation proceedings.* It does not limit the right of excludable aliens detained within United States territory to humane treatment.

Lynch, 810 F.2d at 1373 (emphasis added); *see also Medina v. O'Neill,* 838 F.2d 800, 803 (5th Cir. 1988) (emphasis added) ("In *Lynch* we could conceive of no national interests that would justify 'the malicious infliction of cruel treatment' on an excludable alien").

Given the foregoing, the determination of whether an alien may invoke Fourth and Fifth Amendment protections as an intended beneficiary rests not upon a legal fiction limiting rights in immigration proceedings but rather on individual analyses applicable to the specific amendments following determination of whether the alien is physically located within the sovereign territory of the United States.

As there is no question that plaintiff was physically within the sovereign territory of the United States,[3] the question becomes whether an alien under plaintiff's circumstances is an intended beneficiary of the protections afforded by the Fourth and Fifth Amendments.

D. Fourth Amendment

Plaintiff's complaint reasonably includes claims of wrongful arrest by defendant and defendant's use of excessive force in effecting an arrest in violation of the Fourth Amendment.

The Fourth Amendment to the United States Constitution provides that,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,

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3. Defendant argues that plaintiff effectively was not in the United States as she had not cleared the port of entry and to conclude otherwise would be problematic given the number of aliens who cross into the territorial United States. It suffices to say that the relevant consideration is territorial versus extraterritorial rather than inside or outside the port of entry. Policy arguments pertaining to difficulties caused by those claiming violations or rights within that zone outside the port of entry but within the territorial United States bear little relevance to determination of whether an alien does or does not stand on United States soil, and the law does not turn on such a pragmatic distinction.

> and particularly describing the place to be searched, and the persons or things to be seized.

If plaintiff were a citizen of the United States, the analysis would immediately proceed to the merits of her wrongful arrest and excessive force claims. In the present case, however, plaintiff is not a citizen of the United States and defendant cites to *Verdugo-Urquidez,* 494 U.S. 259, in support of his argument that defendant has no Fourth Amendment rights as an alien. The merits of the two claims may only be considered if the Fourth Amendment applies to plaintiff under the circumstances.

1. Verdugo-Urquidez

Defendant argues that the Supreme Court's decision in *Verdugo-Urquidez* requires the conclusion that the Fourth Amendment does not apply to an alien under the circumstances presented herein as the appellant in that case was not characterized as one of "the people" and therefore entitled to claim Fourth Amendment protection. The Supreme Court in *Verdugo-Urquidez* defined "the people" referred to in the text of the Fourth Amendment as "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 265. The Fifth Circuit later referred to this definition in the course of its discussion of Second Amendment rights in *United States*

v. Emerson, 270 F.3d 203, 229 (5th Cir. 2001), as equating "to individual Americans."[4]

Verdugo-Urquidez involved "an alien who ... had no previous significant voluntary connection with the United States," 494 U.S. at 271, prior to Mexican authorities turning him over to the United States Border Patrol. *Id.* at 262. Agents of the Drug Enforcement Administration with the cooperation of Mexican authorities searched Verdugo-Urquidez's residences in Mexico and seized documents purportedly establishing his involvement in drug smuggling operations. *Id.* at 262-63. Verdugo-Urquidez moved to suppress the documentary evidence as obtained in violation of his Fourth Amendment rights. *Id.* at 263. The district court

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4. Webster's Third New International Dictionary defines "American" as "belonging to, inhabiting, coming from America." The Merriam-Webster Online Dictionary defines "American" as "an American Indian of No[rth] America or So[uth] America[;] . . . a native or inhabitant of No[rth] America or So[uth] America[; or] . . . a citizen of the [United States]." The reference to "individual Americans" should be read in the context of the Court's discussion of collective versus individual rights, *Emerson*, 270 F.3d at 229 ("Proponents of the states' rights and sophisticated collective rights models argue that the phrase 'bear arms' only applies to a member of the militia carrying weapons during actual militia service. Champions of the individual rights model opine that 'bear arms' refers to any carrying of weapons, whether by a soldier or a civilian."). The plaintiff in that case appears to be a resident of the United States and therefore one who would be susceptible to the colloquial characterization of "American". Reading "individual Americans" as an explanation of the Supreme Court's definition of "the people" would result in an ambiguous and relatively unworkable phrase that could easily be interpreted in an over- or under-inclusive manner.

granted the motion to suppress and the Ninth Circuit Court of Appeals affirmed its decision. *Id.* The Supreme Court reversed the decision, concluding that the exclusionary rule did not apply.

Prior to embarking on a substantive discussion of *Verdugo-Urquidez,* likely the best guidepost for analyzing the present issue, it is worth identifying potential detractors from its ability to dictate the outcome of the case at hand. First, the decision does not involve the Fourth Amendment rights of those aliens physically located either legally or illegally within sovereign United States territory.[5] As such, the facts of the decision alone may limit the potential relevancy of *Verdugo-Urquidez.* Second, the definition of "the people" for purposes of Fourth Amendment application relied on by the defendant as rendering the Amendment unavailable to plaintiff is not necessarily binding authority governing the disposition of the present case.

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5. If plaintiff were an illegal alien rather than an alien who had requested and been granted authorization to enter the United States, the question posed would be markedly different in nature. The Supreme Court in *Verduo-Urquidez* notes that "[e]ven assuming [illegal] aliens would be entitled to Fourth Amendment protections, their situation is different from respondent's. The illegal aliens in [an earlier decision] were in the United States voluntarily and presumably had accepted some societal obligations; but respondent had no voluntary connection with this country that might place him among 'the people' of the United States." *Id.* at 272-73. The statement is curious given that the defendant was not an illegal alien but was instead transported by the government into the United States and has prompted some to conclude "Chief Justice Rehnquist has not yet adduced this claim as a basis for denying that undocumented aliens have rights under the Fourth and Fourteenth Amendments, but may do so soon." Gerald L. Neuman, *The Lost Century of American Immigration Law* (1776-1875), 93 COLUM. L.REV. 1833, 1839 (1993).

The second point is worth some explanation as it may not be evident from the decision. The decision in *Verdugo-Urquidez* is clearly not a plurality as the author, Chief Justice Rehnquist, is joined in his opinion by Justices White, O'Connor, Scalia, and Kennedy. Justice Kennedy, however, authored a concurring opinion in which he indicates that he "do[es] not . . . depart in fundamental respects from the opinion of the Court, which I join," *id.* at 275 (Kennedy, J., concurring), but proceeds to state that "I cannot place any weight on the reference to 'the people' in the Fourth Amendment as a source of restricting its protections," *id.* at 276. Not surprisingly, Justice Kennedy's concurrence has caused some to question whether the majority decision is in fact a majority decision in adopting its definition of "the people" for purposes of Fourth Amendment analysis. *See Lamont v. Woods,* 948 F.2d 825, 835 & n. 7 (2d Cir. 1991) (noting that a "plurality of the Court" embraced the definition of "the people"); *see also* Michael J. Wishnie, *Immigrants and the Right to Petition,* 78 N.Y.U.L. REV. 667, 681 (2003) ("Somewhat bafflingly, Justice Kennedy disagreed with Chief Justice Rehnquist's analysis but nonetheless joined the majority opinion in full, providing the fifth vote for the Court's opinion."); Gerald Neuman, *Whose Constitution?,* 100 YALE L.J. 909, 972 (1991) (noting that Justice Kennedy's concurrence "diverged so greatly from Rehnquist's analysis and conclusions that Rehnquist seemed to really be speaking for a plurality of four.").

As such, there is a substantial question as to whether the definition of "the people" is binding on this Court as a majority decision of the Supreme Court or merely persuasive authority by virtue of its characterization as a plurality

decision. This Court is inclined to conclude the latter as the substance of Justice Kennedy's concurring opinion cannot be reconciled with the majority opinion in which he joined. *See, e.g., United States v. Guitterez,* 983 F. Supp. 905, 915 (N.D. Cal. 1998)("[i]t is also noteworthy that a majority of the justices *did not* subscribe to Chief Justice Rehnquist's opinion, particularly with respect to his discussion and analysis regarding the scope of the Fourth Amendment as it applies to illegal aliens" (emphasis in original)), *rev'd on other grounds by United States v. Guitterez,* 203 F.3d 833 (9th Cir. 1999). While other courts may arrive at a contrary conclusion given the peculiar form of the decision, *see, e.g., United States v. Esparza-Mendoza,* 265 F. Supp.2d 1254, 1261 (D. Utah 2003) ("This court is not at liberty to second-guess Justice Kennedy's direct statement that he was joining the Court's opinion."), this Court concludes that the substance of the concurring opinion directs otherwise. A contrary conclusion exalts the form of the decision over its substance and does not resolve Justice Kennedy's concurrence which directly contradicts the substance of the majority opinion in which he joined. The definition of "the people" advanced in *Verdugo-Urquidez* is therefore considered as persuasive authority to the extent it applies to resolution of the present motion for summary judgment.

2. "The People"

As the definition of "the people" set forth in *Verdugo-Urquidez* is not dispositive of defendant's argument, it is necessary to resolve whether an alien, under the circumstances presented herein, may be characterized as one of "the people" for purposes of claiming the protections of

the Fourth Amendment or may otherwise claim its protections. The analysis in *Verdugo-Urquidez* consists of an examination of constitutional text and supporting history. As such, this Court shall engage in a similar analysis, reviewing the portions of *Verdugo-Urquidez* specific to that analysis, evaluating the same under the context of the present case and providing supporting discussion where necessary.

The Supreme Court began its interpretation of the phrase "the people" by reviewing the various references to that phrase throughout the Constitution.[6] *Verdugo-Urquidez,* 494 U.S. at 265. While noting that its "textual exegesis is by no means conclusive," it concludes that "'the people' protected by the Fourth Amendment ... refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* The Court notes that this phrase

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6. *See, e.g.*, U.S. Const. pmbl. ("We the People of the United States, in order to form a more perfect Union, ... do ordain and establish this Constitution for the United States of America."); U.S. Const. amend. I ("the right of the people peaceably to assemble"); U.S. Const. amend II ("the right of the people to keep and bear Arms"); U.S. Const. amend. IV ("[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"); U.S. Const.amend. IX (" [t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"); U.S. Const. amend. X ("[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

stands in contrast to the terms "person" and "accused" used in the Fifth[7] and Sixth[8] Amendments. *Id.* at 265-66. Of the Court's conclusions on its textual analysis in *Verdugo-Urquidez*, little more need be said save noting its concurrence with this Court's conclusion that it is not conclusive.

Verdugo-Urquidez stands as the only current Supreme Court decision to construe the phrase "the people," however it is not the only decision to interpret that phrase. An interpretation may be found in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), ultimately reversed by the adoption of the Thirteenth and Fourteenth Amendments. *See, e.g., Sugarman v. Dougall*, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting). While *Dred Scott* is commonly labeled by

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7. The Fifth Amendment provides that "No *person* shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V (emphasis added).

8. "In all criminal prosecutions, *the accused* shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI (emphasis added).

scholars as one of the more infamous decisions in Supreme Court history, *see, e.g.*, Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1449 (2001) ("Infamous and unjust cases like *Dred Scott v. Sandford* – which held that blacks could not be citizens ... tend to be remembered as examples of how courts should not behave."); Cass R. Sunstein, *The Dred Scott Case with Notes on Affirmative Action, the Right to Die & Same-Sex Marriage*, 1 GREEN BAG 2d 39 (1997), aspects of its textual analysis are worthy of some discussion as it elucidates the present textual analysis.

The *Dred Scott* court focused on the Preamble to the Constitution as the source of its text-based search for the meaning of "the people".

> The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It declares that it is formed by the people of the United States; that is to say, by those who were members of the different political communities in the several States; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the people of the United States, and of citizens of the several States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. *It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the*

> *people*. It uses them as terms so well understood, that no further description or definition was necessary.

Scott, 60 U.S. at 410-11 (emphasis added).

The Court's discussion of the Preamble raises a number of interesting points. It acknowledges that the Preamble is phrased in general terms. It further notes that the terms citizen and "the people" are not defined. Acknowledging these generalities, the Court then proceeds to define "the people" as "members of the different political communities in the several States" and concludes that the definition is obvious as they are "terms so well understood, that no further description or definition was necessary." The observations made as to the Preamble apply with equal force to the other provisions of the Constitution. The Court's definition is not as supportable under the plain meaning of the text.

The *Dred Scott* Court also stated that

> [t]he words 'people of the United States' and 'citizens' are synonymous terms. . . . They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty.

Id. at 404. The phrase "the people" and "citizen" separately appear in the Constitution. As such, the definition of "the

people" set forth above fails under the well established principle of statutory construction that "[t]he use of different terms within related statutes generally implies that different meanings were intended," 2A N. SINGER, SUTHERLAND ON STATUTES and STATUTORY CONSTRUCTION § 46:06, p. 194 (6th ed. 2000), and as such according different meanings comports with a fundamental tool of construction, *see, e.g., Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 173-76 (1803) (utilizing tools of statutory construction). The result of this textual analysis was a single group of beneficiaries under the Constitution, a conclusion which fails under the most basic statutory principles.[9]

Unlike the analysis in *Dred Scott,* the *Verdugo-Urquidez* Court employs this basic standard of statutory construction in nothing that the use of the different terms "people," "person," and "accused" implies separate meanings. But

9. "It is nowhere declared in the Constitution what 'a citizen' is, or what constitutes citizenship. . . . But the fourteenth amendment does define citizenship and the relations of citizens to the State and Federal government. It ordains that 'all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State where they reside.' Citizenship in a State is made by residence and without reference to the consent of the State." *Slaughter-House Cases,* 83 U.S. 36, 52 (1872); *but see* Alexander M. Bickel, *Citizenship in the American Constitution,* 15 ARIZ. L. REV. 369, 369-70 (1973) ("[C]itizenship was nowhere defined in the original Constitution. It was not important. . . . [T]he original Constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself bound by certain standards of conduct in relations with people and persons, not with some legal construct called citizen.").

while "accused" has a distinct meaning from "person" or "people" in the context of criminal proceedings, the difference between "person" and "people" is that of singular word form as compared to plural word form. The Court apparently rejects this distinction out of hand in stating that "[c]ontrary to the suggestion of *amici curiae* that the Framers used this phrase simply to avoid [an] awkward rhetorical redundancy, . . . 'the people' seems to have been a term of art employed in select parts of the Constitution." *Verdugo-Urquidez,* 494 U.S. at 265 (citation and internal quotation marks omitted).

Justice Brennan comments on Chief Justice Rehnquist's conclusion, noting that "[t]he drafting history of the Fourth Amendment . . . does not support the majority's interpretation of 'the people.'" *Verdugo-Urquidez,* 494 U.S. at 288 (Brennan, J., dissenting). The Framers were offered alternative drafts of the Fourth Amendment, replacing "the people" with "citizens," "freemen" "residents," or "the American people" but elected not to incorporate these changes,[10] *id.,* some terms which appear to be the effective

10. 69th Cong. 1st Sess. (1927), H.Doc. No. 398, at p. 1034 (Letter of the president of the Federal Convention, September 17, 1787, to the President of Congress, transmitting the Constitution: "That every Freeman has a right to be secure from all unreasonable searches and seizures of his person his papers or his property, and therefore, that all Warrants to search suspected places or seize any Freeman his papers or property, without information upon Oath or Affirmation of sufficient cause, are grievous and oppressive; and that all general Warrants (or such in which the place or person suspected are not particularly designated) are dangerous and ought not to be granted."); 2 LETTERS OF RICHARD HENRY LEE 442 (James C. Ballagh ed., 1970) ("the Citizens shall not be exposed to unreasonable searches, seizure of their persons, houses, papers, or property.").

equivalents of the definition of "the people" offered in the majority opinion. Michael Scaperlanda, *Polishing the Tarnished Golden Door,* 1993 WIS. L. REV. 965, 998 (1993) (noting that "the Court's textual analysis [in *Verdugo*] finds no precedential support. Until *Verdugo* . . . , no Supreme Court case suggested that the word 'people' was less catholic than the terms 'person' or 'accused' when used in the context of the criminal procedure amendments."). Given the definition of "the people" set forth in *Verdugo-Urquidez,* which in the spectrum of allegiance to the United States is closer to the definition of "citizen"[11] than it is to anyone, it is difficult to rest such a sweeping definitional distinction on a numeric distinction. It could just as well be said that

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11. The term "citizen" is itself used throughout the Constitution, implying a separate meaning than would be ascribed "the people". *See, e.g.,* U.S. Const. amend. XIV, § 1 ("[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"); U.S. Const. art. I, § 2, cl. 2 (U.S. Representatives must be "seven Years a Citizen of the United States"); U.S. Const. art. I, § 3, cl. 3 (U.S. Senators must be "nine Years a Citizen of the United States"); U.S. Const. art. II, § 1, cl. 5 (the President must be not only a citizen, but a "natural born Citizen" of the United States); U.S. Const. art. III, § 2, cl. 1 (creating alienage jurisdiction in Federal Court for cases involving U.S. citizens and "foreign . . . [c]itizens"); U.S. Const. amend. XV, § 1 ("[t]he right of citizens of the United States to vote shall not be denied or abridged . . . on account of race"); U.S. Const. amend. XIX, cl. 1 ("[t]he right of citizens of the United States to vote shall not be denied or abridged . . . on account of sex"); U.S. Const. amend. XXIV, § 1 ("[t]he right of citizens of the United States to vote in any primary or other election . . . shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax"); U.S. Const. amend. XXVI, § 1 ("[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged . . . on account of age).

"the people" is comprised of the aggregate "person[s]" and the individual would be the beneficiary of rights afforded the group.

The Preamble refers to "the people of the United States," and such reference served as a basis for the Supreme Court in *Dred Scott* to equate "the people" to "citizen,"[12]

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12. The Court reasoned that

> It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guaranteed to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.
>
> It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution

(Cont'd)

notwithstanding the interpretive difficulties in so doing as it renders the term "citizen" surplusage. While "the people" may be read as shorthand for "the people of the United States," that phrase itself may alternatively be interpreted as "the people within the territory of the United States" rather than "citizens of the United States." It suffices to say that the reason for using the plural version of the word "person" is not apparent from the text employed throughout the Constitution. *See* LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 350 (1988) ("The Framers had a genius for studied imprecision and calculated ambiguity. They relied on generalized terms . . . because politics required compromise, and because compromise required ambiguity.").

Ultimately, it suffices to say that the Supreme Court has not in the past exclusively relied on a textual analysis. If such were the case, one may be inclined to ask why equal protection applies with equal force to the federal government when the Constitution expressly proscribes state action through the Fourteenth Amendment. *Schneider v. Rusk*, 377

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> was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognized as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms.

Scott, 60 U.S. at 406-407.

U.S. 163, 168 (1964) ("while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process'"). One may also ask why the Fourth Amendment protections are made applicable to the states when by its text it restrains only the federal government. *Wolf v. People of the State of Colo.*, 338 U.S. 25, 27-28 (1949), *overruled in part on other grounds by Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) ("The security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause" of the Fourteenth Amendment). While these examples are not exhaustive, they are illustrative of a constitutional interpretations that do not necessarily hinge on the text and instead require an interpretation consistent with history and if necessary rights found elsewhere in the Constitution. As such, this Court notes the conclusion of the Ninth Circuit Court of Appeals in its textual analysis

> We do not read the phrase 'The right of the people to be secure' as restricting the application of the fourth amendment to any special class of people. The language of the amendment does not so limit 'people,' and we will not insert qualifying language into the amendment to limit its application in such a fashion.

United States v. Verdugo-Urquidez, 856 F.2d 1214, 1223 (9th Cir. 1988).

Appendix B

As the text of the Fourth Amendment ultimately does not identify its intended beneficiaries, it is necessary to review history to see if it points to a solution.[13] The Supreme Court's historical observations in *Verdugo-Urquidez* are two-fold, neither of which necessarily bears relevance to the present case. First, the "purpose [of the Fourth Amendment] was to restrict searches and seizures which might be conducted by the United States *in domestic matters.*" *Verdugo-Urquidez*, 494 U.S. at 266 (emphasis added). Second, "[t]here is . . . no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States *directed against aliens in foreign territory or in international waters.*" *Id.* at 267 (emphasis added). Both observations refer to extraterritorial application and do not address the domestic rights of aliens. As such, further inquiry is required.

It is helpful to begin this analysis by reviewing general observations made and conclusions drawn by the Supreme Court as to the Fourth Amendment.

> It would not be possible to add to the emphasis with which the framers of our Constitution and this court . . . have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by [the Fourth and Fifth] amendments. The effect of the decisions cited is:

13. The parties do not refer to history in their briefs, relying instead on case citations that do not resolve the issue. The historical references provided are therefore this Court's research on the subject and likely not exhaustive of potential resources.

> That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen – the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers.

Gouled v. United States, 255 U.S. 298, 303-304 (1921) (citations omitted), *overruled in part on other grounds by Warden, Md. Penitentiary v. Hayden,* 387 U.S. 294, 303-304 (1967).

The Supreme Court, as in other areas, refers to English common law known to the Framers in defining the parameters of Fourth Amendment rights.

> In order to ascertain the nature of the proceedings intended by the fourth amendment to the constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the

> controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.

Boyd v. United States, 116 U.S. 616, 624-25 (1886), *overruled in part on other grounds by Warden, Md. Penitentiary v. Hayden,* 387 U.S. 294 (1967); *see also Wilson v. Arkansas,* 514 U.S. 927, 931 (1995) ("In evaluating the scope of this right, we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing."). American statesman who drafted the Constitution were presumably familiar with significant decisions in English law. *Id.* at 626.

> As every American stateman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of

Appendix B

> English freedom, [*Entick v. Carrington*, 95 Eng. Rep. 807 (K.B.1765).] and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the fourth amendment to the constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.

Boyd, 116 U.S. at 626-27.

The importance of *Entick* in Fourth Amendment jurisprudence cannot be understated. The Supreme Court felt it significant enough to quote it copiously making it a foundation of Fourth Amendment jurisprudence.

> The principles laid down in this opinion . . . *Entick* affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense, – it is the invasion of this sacred right which underlies and constitutes the essence of Lord CAMDEN's

> judgment. . . . Can we doubt that when the fourth and fifth amendments to the constitution of the United States were penned and adopted, the language of Lord CAMDEN was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and 'unreasonable' character of such seizures? . . . The struggles against arbitrary power in which they had been engaged for more than 20 years would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred. *Id.* at 630.

But while *Entick* provides valuable insight into the Fourth Amendment right, other sources of English law may provide valuable insight into the status of aliens. *Alden v. Maine,* 527 U.S. 706, 715 (1999)(identifying English law at the time Constitution was ratified as relevant in constitutional analysis); *see also Neder v. United States,* 527 U.S. 1, 30, (1999) (Scalia, J., dissenting)(referring to William Blackstone as "the Framers' accepted authority on English law and the English Constitution"). The Magna Carta further holds a venerable place in Constitutional jurisprudence. *See, e.g., Duncan v. State of La.,* 391 U.S. 145, 151 (1968) (discussing the origins of jury trials with reference to the Magna Carta); *Trop v. Dulles,* 356 U.S. 86, 100 (1958) (discussing the Magna Carta in context of Eighth Amendment). Neither

Appendix B

English law generally nor the Magna Carta specifically supports the proposition that alien friends were considered less worthy of protection.

In his *Commentaries,* Blackstone describes the concepts of allegiance expected from and governmental protections due citizens and aliens.

> Allegiance, both express and implied, is however distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. . . . Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstance, nor by any thing but the united concurrence of the legislaturen.
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> Local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the King's dominion and protection; and it ceases the instant such stranger transfers himself from this Kingdom to another. Natural allegiance is therefore perpetual, and local temporary only; and that for this reason, evidently founded upon the nature of government; that allegiance is a debt due from the subject, upon an implied contract

> with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. . . . As therefore the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, *as the prince affords his protection to an alien, only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British empire.*

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 357-59 (1769) (availabie at http://www.yale.edu/lawweb/avalon/blackstone/bklch10.htm) (emphasis added).[14]

Blackstone refers to international law, then referred to as the law of nations, in the form of safe conducts granted by the crown, by which aliens not characterized as enemies were protected in English territory. "Safe conduct" is defined as "[a] privilege granted by a belligerent allowing an enemy, a neutral, or some other person to travel within or through a designated area for a specified purpose[; or] . . . [a] document conveying this privilege. . . . The grantee is inviolable so long

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14. Modern English courts reviewing the same history do not differ on this conclusion. "[A]lien friends have long since been, and are at the present day, treated, in reference to civil rights, *as if they were British subjects,* and *are entitled to the enjoyment of all personal rights of a citizen,* including the right to sue in the King's Courts." *Porter v. Freudenberg,* [1915] 1 App. Cas. 857, 869 (K.B. 1914) (emphasis added).

as he complies with the conditions imposed on him or necessitated by the circumstances of the case." BLACK'S LAW DICTIONARY (8th ed. 2004). Blackstone states that

> Upon exactly the same reason stands the prerogative of granting safe-conducts, without which by the law of nations no member of one society has a right to intrude into another. And therefore ... it is left in the power of all states ... to take such measures about the admissions of strangers, as they think convenient; those being ever excepted who are driven on the coasts by necessity, or by any cause that deserves pity or compassion. Great tenderness is shown by our laws, not only to foreigners in distress (as will appear when we come to speak of shipwrecks) but with regard also to the admissions of strangers who come spontaneously. For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the king's protection; though liable to be sent home whenever the king sees occasion. But no subject of a nation at war with us can, by the law of nations, come into the realm, nor can travel himself upon the high seas, or send his goods and merchandize from one place to another, without danger of being seized by our subject, unless he had letters of safe-conduct; which by divers ancient statutes must be granted under the king's great seal and inrolled in chancery, or else are of

> no effect: the king being supposed the best judge of such emergencies, as may deserve exception from the general law of arms.

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 251-52 (1769) (available at http://www.yale.edu/lawweb/avalon/blackstone/bklch7.htm).[15] Blackstone adds that violation of safe conducts was prohibited under municipal laws notwithstanding its international law character. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769) ("[t]he principal offence against the law of nations, *animadverted on as such by the municipal laws of England,* are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of embassadors; and, 3. Piracy" (emphasis added)).

Protections due specific aliens may be found in the Magna Carta, which offered safe passage to foreign merchants not characterized as alien enemies.

> All merchants shall have safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the ancient

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15. "To say that aliens were not citizens, and in particular that they could not hold real estate, was not to say that aliens were to be treated as outlaws. On the contrary, civilized countries extended to aliens the protection of the laws. Blackstone noted that the King of England protected aliens while they were within the realm, although he protected his natural-born subjects everywhere and at all times." John Harrison, *Reconstructing the Privileges or Immunities Clause,* 101 YALE L.J. 1385, 1442 (1992).

> and right customs, quit from all evil tolls, except (in time of war) such merchants as are of the land at war with us. And if such are found in our land at the beginning of the war, they shall be detained, without injury to their bodies or goods, until information be received by us, or by our chief justiciar, how the merchants of our land found in the land at war with us are treated; and if our men are safe there, the others shall be safe in our land.

Magna Carta 1215 ¶ 41 (available at http:// www.yale.edu/ lawweb/avalon/medieval/magna.htm). Significantly, the Magna Carta also provided that "No free man[16] shall be arrested . . . except by the lawful judgment of his peers or by the law of the land." The Magna Carta ¶ 39.

Evident in English law is concerns as to the proper treatment of alien friends, or rather those not characterized as alien enemies. The protections afforded in domestic matters were not readily distinguishable from those afforded a citizen, about which Blackstone notes "[g]reat tenderness is sh[o]wn by our laws . . . to foreigners . . . who come spontaneously." Blackstone's references to safe conduct,

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16. It is debatable as to whether "freeman" in 1215 translates to all English males, "freeholders," or landowners. Jane Rutherford, *The Myth of Due Process,* 72 B.U.L. REV. 1, 66 n.336 (1992). As to the definition of that term at the time the Constitution was ratified, John Adams stated "[t]here are but two sorts of men in the world, freemen and slaves. The very definition of a freeman . . . is one who is bound by no law to which he has not consented." JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION 158 (1992).

while generally a question of international law, indicates that violations of safe conduct were protected under domestic law. The distinction between international law, arguably of little value in its modern form in interpreting the nature of domestic rights, Antonin Scalia, *Commentary,* 40 ST. LOUIS U.L.J. 1119, 1119 (1996) ("United States courts enforce international 'human rights norms' only to the extent that such norms are embodied in national laws."), and domestic law is not easily dismissed as an irrelevancy when considered as law at the time the Constitution was framed.

As Chief Justice Marshall notes in one of the earlier Supreme Court decisions that "the Court is bound by the law of nations which is a part of the law of the land." *The Nereide,* 13 U.S. (9 Cranch) 388, 423 (1815); *see also The Paquete Habana,* 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"); Scalia, *Commentary,* 40 ST. LOUIS U.L.J. at 1120 (stating that in *The Paquete Habana* the Supreme Court "understood 'international law' as a kind of common law of the nations, serving an interstitial function, and relevant only in the absence of contrary law established by the political branches of government"). The Framers were well aware of this practice in international law, encouraging states to provide laws equivalent to the local practice in England. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136-37 (G. Hunt ed.1912) ("in 1781 the Congress implored the States to vindicate rights under the law of nations ... call[ing] upon state legislatures to 'provide expeditious, exemplary, and adequate

punishment' for 'the violation of safe conducts or passports'"). Absent projecting the modern application of international law on constitutional interpretation, it cannot be said that the international law described by Blackstone would be irrelevant to the Framers in determining the intended scope of the Fourth Amendment.[17]

It is not beyond comprehension, given the role of merchant in facilitating commerce at the time the Magna Carta issued and the evolution of modern transportation permitting end users of goods to travel to the source of such goods that the practice of protecting merchants would encompass the modern day border migratory. The Supreme Court itself has acknowledged that commerce has undergone radical transformations since the Constitution was drafted. *United States v. Lopez,* 514 U.S. 549, 574 (1995) (*"[s]tare decisis* . . . forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries"). In modern times with the availability of automobiles, it could be said that the buying and selling of goods by migrants within the narrow regions proscribed by use of border crossing cards is the modern equivalent of the merchant at the time of the Magna Carta. *See* Phil Magers, *Analysis: Bush*

17. The Supreme Court, in discussing the constitutional rights of aliens, has stated in domestic matters that "[m]ere lawful presence in the country creates an implied assurance of safe conduct." *Eisentrager,* 339 U.S. at 770. It would be a strange coincidence indeed if the Court's reference to "safe conduct" discussing the rights of an alien was a mere coincidental use of language and not a reference to the practice.

Appendix B

Border Move May Win Votes, WASH. TIMES, Aug. 10, 2004 ("Mexicans and U.S. border businessmen and politicians have been complaining to Washington that the legal visitors should have more time to shop, conduct business or vacation. The cards were never intended for work but to foster commerce."). One need not look far to find the economic impact of legal border crossings. *See, e.g.,* Gary Fields, *Security Programs To Speed Action On Illegal Aliens,* WALL STREET J., Aug. 11, 2004, at A4 (quoting Undersecretary for Border and Transportation Security Asa Hutchinson as identifying "significant commercial benefit for border communities" in increasing the length of stay permitted by border crossing cards); Jerry Seper, *Border Plan Expedites Removals, Extends Visits; Homeland Security Draws Line at Legality, Mexican Nationality,* WASH. TIMES, Aug. 11, 2004, at A3 ("The biometric and machine-readable Laser Visa cards allow visitors who have undergone criminal background checks to enter the United States to make 'positive contributions' to the U.S. economy."). If the practice incorporated into the Magna Carta were considered capable of such an extension, and given the Framers concerns in the areas of commerce and encouraging a desirable alien immigration, it is possible that lawful aliens would be subject to Fourth Amendment protections.

In light of the foregoing authority on English law, there is little indication that the Framers would rely on English law as a source for denying aliens protections against unlawful search and seizure. As such, the question becomes whether United States history or law at the time the Constitution was ratified requires such a conclusion. The law

of the States does not reveal protections afforded only citizens, instead revealing the spectrum of language used in the proposed drafts of the Fourth Amendment.[18]

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18. Many of the State provisions used the "law of the land" language found in the Magna Carta and many further afforded rights to men or freemen rather than citizens. *See* Del. Const., Declaration of Rights, art. 12 (1776) ("every Freeman for every Injury done him in his Goods, Lands or Person, by any other Person, ought to have Remedy by the Course of the Law of the Land, and ought to have Justice and Right for the Injury done to him freely without Sale, fully without any Denial, and speedily without Delay, according to the Law of the Land."); Mass. Const., Part I, art. XII (1780) ("no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land"); Md. Const., Declaration of Rights, art. XXI (1776) ("no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land."); N.C. Const., Declaration of Rights, art. XII (1776) ("That no freeman ought to be taken, imprisoned, or disseized of his freehold liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land."); N.H. Const., art. I, Sec. XV. (1784) ("no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."); N.Y. Const., art. XIII (1777) ("no member of this State shall be disfranchised, or deprived of any the rights or privileges secured to the subjects of this State by this constitution, unless by the law of the land, or the judgment of his peers."); Penn. Const., Declaration of Rights, art. IX (1776) ("nor can any man be justly deprived of his

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Appendix B

This Court's research reveals little of a historical nature that could be perceived as an intent to leave aliens not characterized as alien enemies outside the protections of the Fourth Amendment. There is evidence that the Framers were concerned of foreign influence over the government if the citizenship bar was set too low,[19] but it is also evident that

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liberty except by the laws of the land, or the judgment of his peers"); S.C. Const., art. XLI (1778) ("no freeman of this State be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, exiled or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land."); Va. Bill of Rights, Sec. 8 (1776) ("that no man be deprived of his liberty, except by the law of the land or the judgment of his peers."); see also Thomas Y. Davies, *The Fictional Character of Law-and-order Originalism: A Case Study of the Distortions and Evasions of Framing-era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L.REV. 239, 392 n.518 (2002) (noting that Connecticut law in 1776 provided "That no Man's Life shall be taken away: No Man's Honor or good Name shall be stained: No Man's Person shall be arrested, restrained, banished, dismembered, nor any ways punished . . . unless clearly warranted by the Laws of this State" and the Continental Congress in the Northwest Ordinance of 1787, art. II., provided that "No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land.").

19. 69th Cong. 1st Sess. (1927), H.Doc. No. 398, at p. 500, (Debates in the Federal Convention of 1787 as reported by James Madison, Aug. 9) (citing Morris as stating he "moved to insert 14 instead of 4 years citizenship as a qualification for Senators: urging the danger of admitting strangers into our public Councils"); *Id.* (James Madison found a longer residence requirement improper "because it will give a tincture of illiberality to the Constitution: because it will put it out of the power of the Natl Legislature even
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Appendix B

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by special acts of naturalization to confer the full rank of Citizens on meritorious strangers & because it will discourage the most desireable [sic] class of people from emigrating to the U.S. Should the proposed Constitution have the intended effect of giving stability & reputation to our Govts. great numbers of respectable Europeans: men who love liberty and wish to partake its blessings, will be ready to transfer their fortunes hither. All such would feel the mortification of being marked with suspicious incapacitations though they sd. not covet the public honors"); *id.* (Benjamin Franklin stated he "should be very sorry to see anything like illiberality inserted in the Constitution. The people in Europe are friendly to this Country. Even in the Country with which we have been lately at war, we have now & had during the war, a great many friends not only among the people at large but in both houses of Parliament. In every other Country in Europe all the people are our friends. We found in the course of the Revolution that many strangers served us faithfully – and that many natives took part agst. their Country. When foreigners after looking about for some other Country in which they can obtain more happiness, give a preference to ours it is a proof of attachment which ought to excite our confidence & affection."); *id.* (Edmund Randolph stating he "did not know but it might be problematical whether emigrations to this Country were on the whole useful or not: but be could never agree to the motion for disabling them for 14 years to participate in the public honours. He reminded the Convention of the language held by our patriots during the Revolution, and the principles laid down in all our American Constitutions. Many foreigners may have fixed their fortunes among us under the faith of these invitations. All persons under this description, with all others who would be affected by such a regulation, would enlist themselves under the banners of hostility to the proposed System. He would go as far as seven years, but no farther."); *id.* (James Wilson stated "he rose with feelings which were perhaps peculiar; mentioning the circumstance of his not being a native, and the possibility, if the ideas of some gentlemen should be pursued, of his being
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Appendix B

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incapacitated from holding a place under the very Constitution, which he had shared in the trust of making. He remarked the illiberal complexion which the motion would give to the System, & the effect which a good system would have in inviting meritorious foreigners among us, and the discouragement & mortification they must feel from the degrading discrimination, now proposed. He had himself experienced this mortification. On his removal into Maryland, he found himself, from defect of residence, under certain legal incapacities which never ceased to produce chagrin, though he assuredly did not desire & would not have accepted the offices to which they related. To be appointed to a place may be matter of indifference. To be incapable of being appointed, is a circumstance grating and mortifying."); *id.* (Gouverneur Morris stating "It is said that some tribes of Indians, carried their hospitality so far as to offer to strangers their wives & daughters. Was this a proper model for us? He would admit them to his house, he would invite them to his table, would provide for them comfortable lodgings; but would not carry the complaisance so far as, to bed them with his wife. He would let them worship at the same altar, but did not choose to make Priests of them. He ran over the privileges which emigrants would enjoy among us, though they should be deprived of that of being eligible to the great offices of Government; observing that they exceeded the privileges allowed to foreigners in any part of the world; and that as every Society from a great nation down to a club had the right of declaring the conditions on which new members should be admitted, there could be no room for complaint. As to those philosophical gentlemen, those Citizens of the World as they call themselves, He owned he did not wish to see any of them in our public Councils. He would not trust them. The men who can shake off their attachments to their own Country can never love any other. These attachments are the wholesome prejudices which uphold all Governments, Admit a Frenchman into your Senate, and he will study to increase the commerce of France; an Englishman, he will feel an equal biass in favor of that of England. It has been said that The

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the Framers did not want to make a citizenship requirement so onerous that it would discourage desirable aliens from immigrating to the United States and debate generally manifest concerns as to perceptions of inhospitality. It is further noteworthy that the earliest naturalization requirements were decidedly liberal. *Ozawa v. United States,* 260 U.S. 178, 192 (1922) (quoting the Naturalization Act, ch. 3, 1 Stat. 103 (1790)) ("[a]ny alien, being a free white person ... may be admitted to become a citizen"); *see also* Peter H. Schuck, *The Transformation of Immigration Law,* 84 COLUM. L.REV. 1, 8 (1984) ("As early as the colonial period, citizenship was automatically conferred by birth within the colony, for those born elsewhere, that status could still be readily obtained. Anxious to attract labor and enhance property values, the colonies actively and imaginatively promoted immigration by Europeans."). There only evidence that might point to restrictions on alien rights is directed at alien enemies, The Alien Enemy Act of 1798, 1 Stat. 577, *as amended,* 50 U.S.C. § 21 ("[w]henever there is a declared war between the United States and any foreign nation or government ... and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended,

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Legislatures will not chuse foreigners, at least improper ones. There was no knowing what Legislatures would do. Some appointments made by them, proved that every thing ought to be apprehended from the cabals practised on such occasions. He mentioned the case of a foreigner who left this State in disgrace, and worked himself into an appointment from another to Congress.").

restrained, secured, and removed as alien enemies"). *See Eisentrager,* 339 U.S. at 775 ("[t]he resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a 'declared war' exists"). As drafts of the Kentucky Resolution make clear, the Act was not without opposition.[20] There were additionally State laws directed

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20. The various positions on aliens closely following the adoption of the Bill of Rights has been described as follows:

> Early in the existence of the young republic, the constitutional status of aliens triggered animated discussion. Debates surrounding the Alien Act of 1798, which authorized the President to summarily expel "dangerous" noncitizens, had raised the question of the constitutional protection of aliens. While Jeffersonians advocated an inclusive view of the Constitution, the Federalists subscribed to a membership-social contract model of the Constitution. Some Federalists argued that aliens, as nonparties to the Constitution, were excluded from its protection. Madison, while subscribing to the membership model, carefully refrained from concluding that aliens were automatically excluded from the Constitution. He suggested that the line to be drawn was not between aliens and citizens, rather the line should properly be drawn between alien-friends and alien-enemies. Any other result, Madison maintained, triggered an absurdity: "If aliens had no rights under the Constitution, they might not only be banished, but even capitally punished, without a jury or the other incidents to a fair trial."

Annie M. Chan, *Community and the Constitution: A Reassessment of the Roots of Immigration Law,* 21 VT. L.REV. 491, 520-21 (1996).

against aliens characterized as criminals, vagabonds and paupers. Gerald L. Neuman, *The Lost Century of American Immigration Law* (1776-1875), 93 COLUM. L. REV. 1833, 1846-47 (1993). None of these laws result in the conclusion that a lawful alien would be denied protections under the Fourth Amendment.

In light of the state of English law at the time the Framers drafted the Fourth Amendment, this Court would read the foregoing history as precluding the application of a restrictive definition of "the people" that would deny all rights in which that phrase is found and instead require a review of the nature of the particular right claimed and whether such right was intended for the particular individual. The motivation for the First Amendment is not necessarily the same as the Fourth Amendment, though the text of both amendments includes a reference to "the people," while the Fourth and Fifth Amendments have been characterized as closely connected, notwithstanding the fact that the former uses the phrase "the people" while the latter employs the term "person". *United States ex rel. Turner v. Williams,* 194 U.S. 279, 292 (1904) (holding excludable alien is not entitled to First Amendment rights, because "[h]e does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law"); *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886) ("[t]he fourteenth amendment['s] ... provisions are universal in their application, *to all persons within the territorial jurisdiction,* without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws" (emphasis added)); *Mathews v. Diaz,* 426 U.S. 67, 77-78 (1976) ("The Fifth Amendment, as well as the Fourteenth

Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. . . . Even one whose *presence in this country* is unlawful, involuntary, or transitory is entitled to that constitutional protection." (Emphasis added)); *Wong Wing v. United States,* 163 U.S. 228, 238 (1896) ("it must be concluded that *all persons within the territory of the United States* are entitled to the protection guarantied by [the fifth and sixth] amendments" (emphasis added)), *holding limited by Verdugo,* 494 U.S. at 271 ("aliens receive constitutional protections when they have come *within the territory of the United States* and developed substantial connections with this country" (emphasis added)); *see also Johnson v. Eisentrager,* 339 U.S. 763, 778, 783 (1950) (holding that aliens outside sovereign territory of the United States may not avail themselves of Fifth Amendment protection). In the case of those effectively granted safe passage into and out of the United States, it is difficult to accept the proposition that the Framers intended, absent any contrary indication in historical documents or law, that the Fourth Amendment protections would not apply to lawful alien visitors in this country.[21] *Kwong Hai Chew v. Colding,* 344 U.S. 590, 598

21. The Draft of the Kentucky Resolutions, opposing the Alien Enemy Act, further stands as evidence of this conclusion. "Resolved, That alien friends are under the jurisdiction and protection of the laws of the State wherein they are: that no power over them has been delegated to the United States, nor prohibited to the individual States, distinct from their power over citizens." Draft of Kentucky Resolutions ¶ 4 (October 1798) (available at http://www.yale.edu/

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n. 5 (1953) ("once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."). Indeed, such a conclusion is controverted by history.

The history deemed relevant by the Supreme Court in *Verdugo-Urquidez* focused on the purpose of the Fourth Amendment in restricting searches in domestic matters and the question as to whether the Fourth Amendment was ever intended to apply to "aliens in foreign territory or in international waters." The emphasis of the decision therefore can be read as less of an intent to set forth a universally applicable definition of who may properly be characterized as "the people"[22] and more an attempt to strike a balance between the sovereign power of the United States to address matters international in character, *Principality of Monaco v. State of Mississippi,* 292 U.S. 313, 331 (1934) ("[t]he National Government, by virtue of its control of our foreign

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lawweb/avalon/jeffken.htm). The Fundamental Constitutions of Carolina, art. 118 (March 1, 1669) (available at http:// www.yale.edu/ lawweb/avalon/states/nc05.htm) ("Whatsoever alien shall, in this form, before any precinct register, subscribe these fundamental constitutions, shall be thereby naturalized.").

22. Justice Brennan's dissent provides a useful summary of the debates on the language employed in the Fourth Amendment. "The [Fourth] Amendment was introduced on the floor of Congress, considered by Committee, debated by the House of Representatives and the Senate, and submitted to the 13 States for approval. Throughout that entire process, no speaker or commentator, pro or con, referred to the term 'the people' as a limitation." *Verdugo-Urquidez,* 494 U.S. at 289.

relations is entitled to employ the resources of diplomatic negotiations and to effect such an international settlement as may be found to be appropriate, through treaty, agreement, of arbitration, or otherwise"); *see also Nishimura Ekiu v. United States,* 142 U.S. 651, 659 (1892) ("In the United States this power is vested in the national government, to which the constitution has committed the entire control of international relations, in peace as well as in war."),[23] while at the same time not completely discounting the extra-territorial application of the Fourth Amendment, *see Reid v. Covert,* 354 U.S. 1, 5 (1957) ("we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights"); *United States v. Conroy,* 589 F.2d 1258, 1264 (5th Cir. 1979) ("The Fourth Amendment not only protects all within our bounds; it also shelters our citizens wherever they may be in the world from unreasonable searches by our own government."). Read in that limited context, the definition of "the people" set forth in *Verdugo-Urquidez* does not appear to be excessively limiting in scope.[24]

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23. In *Verdugo-Urquidez,* for example, conduct of search and seizures requested to be conducted in Mexico by the United States is governed by the *Mutual Legal Assistance Cooperation Treaty,* Dec. 9, 1987, U.S.-Mex., art. 1, entered into force May 3, 1991, 27 I.L.M. 447 (1988). Such Treaty provides that searches and seizures will be conducted by the host state in accordance with the host state's legal provisions. *Id.*

24. The Second Circuit Court of Appeals considered the *Verdugo* decision a "helpful analytical framework for determining

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Appendix B

Ultimately, it is difficult to interpret the Fourth Amendment in a manner that would deny its protection to those aliens who lawfully seek to enter this country. History indicates that the Framers were very circumspect about conferring significant authority on the federal government to conduct searches and seizures. It would be difficult to accept the proposition that this concern along with prior admonitions from the Supreme Court not to tread lightly in narrowly interpreting Fourth Amendment protections would foreclose such protections to lawfully admitted aliens. It further would be difficult to embrace such a limitation in light of the protections historically conferred on alien friends.

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whether other constitutional provisions apply to governmental activities having extraterritorial dimensions," distilling the decision into a three-part test to determine the application of rights to extraterritorial government activities: "(1) the operation and text of the constitutional provision; (2) history; and (3) the likely consequences if the provision is construed to restrict the government's extraterritorial activities." This standard is consistent with other courts that have found *Verdugo* applicable to cases involving the extraterritorial application of constitutional provisions. *Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 202 (D.C.Cir. 2001) ("Neither the word 'only' nor anything else in the holding purports to establish whether aliens who have entered the territory of the United States and developed connections with this country but not substantial ones are entitled to constitutional protections."); *Theck v. Warden, I.N.S.*, 22 F. Supp. 2d 1117, 1123 (C.D. Cal. 1998) ("[t]he holding in *Verdugo* is limited to extraterritorial searches and seizures"); *United States v. Davis*, 905 F.2d 245, 251 (9th Cir. 1990) ("*Verdugo-Urquidez* only held that the fourth amendment does not apply to searches and seizures of nonresident aliens in foreign countries").

Appendix B

If aliens had no protection against searches and seizures, it would be difficult to envision any equivalent of safe conduct for those who comply with federal law in seeking entrance to the United States.[25]

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25. While the argument is not advanced by the parties, given the length of the discussion on the application of the Fourth Amendment to aliens it might be said under the qualified immunity analysis that the right was not clearly established at the time of the incident. "'[C]learly established' for purposes of qualified immunity means that [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Wilson v. Layne*, 526 U.S. 603, 614-15 (1999) (internal quotation marks omitted). Given the wealth of law prior to *Verdugo-Urquidez* indicating that aliens in the territorial United States could avail themselves of Fourth Amendment protections, and the law generally prohibiting wrongful arrest and the use of excessive force in arrests, such an argument would be untenable. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1234 (9th Cir. 1988) (Wallace, J., dissenting) ("aliens in this country are sheltered by the fourth amendment"), *rev'd*, 494 U.S. 259 (1990); *United States v. Duggan*, 743 F.2d 59, 75 (2d Cir. 1984) ("[B]oth the Fourth Amendment and the Equal Protection Clause afford protection to all aliens"); *Jean v. Nelson*, 727 F.2d 957, 972 (11th Cir. 1984) (en banc) ("Aliens seized by United States officials for suspected involvement in criminal activity are entitled to the same constitutional rights that normally apply in such proceedings."), *aff'd*, 469 U.S. 1071 (1985); *Babula v. INS*, 665 F.2d 293, 299 n. 2 (3d Cir. 1981) (Adams, J., concurring) ("some degree of protection under the Fourth Amendment is afforded to aliens illegally present

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within the country"); *United States v. Williams,* 617 F.2d 1063, 1078 n. 17 (5th Cir. 1980) (en banc) ("once we subject . . . aliens to criminal prosecution, they are entitled to the equal protection of all our laws, including the Fourth Amendment"); *United States v. Conroy,* 589 F.2d 1258, 1264 (5th Cir. 1979) ("[t]he Fourth Amendment . . . protects all within our bounds"); *United States v. Cortes,* 588 F.2d 106, 110 (5th Cir. 1979) ("[o]nce aliens become subject to liability under United States law, they also have the right to benefit from [Fourth Amendment] protection"); *United States v. Cadena,* 585 F.2d 1252, 1262 (5th Cir. 1978) ("once we subject . . . aliens to criminal prosecution, they are entitled to the equal protection of all our laws, including the Fourth Amendment"), *overruled on other grounds by United States v. Michelena-Orovio,* 719 F.2d 738 (5th Cir. 1983); *United States v. Cruz,* 581 F.2d 535, 537 (5th Cir. 1978) ("[t]his [law enforcement] task must, however, be performed with due regard to the Fourth Amendment to the Constitution, which affords citizen and alien alike protection against illegal stops, searches, and arrests"), *overruled on other grounds by United States v. Causey,* 834 F.2d 1179 (5th Cir. 1987); *United States v. Barbera,* 514 F.2d 294, 296 n. 3 (2d Cir. 1975) ("[a]n alien within the United States has standing to assert a violation of constitutional rights even if his [or her] presence is illegal"); *United States v. Toscanino,* 500 F.2d 267, 280 (2d Cir. 1974) ("[i]t is beyond dispute that an alien may invoke the Fourth Amendment's protection against an unreasonable search conducted in the United States"); *United States v. Christancho-Fuerto,* 475 F.2d 1025, 1029 (5th Cir. 1973) ("Despite the fact that they may be illegal entrants into the United States, aliens as well as citizens enjoy Fourth Amendment protection."); *Cheung Tin Wong v. INS,* 468 F.2d 1123, 1126 (D.C. Cir. 1972) ("aliens in this country are sheltered by the Fourth Amendment in common with citizens"); *United States ex rel. De Luca v. O'Rourke,* 213 F.2d 759, 763 (8th Cir. 1954) ("[a]liens, so long as they are permitted to remain in the United States, are entitled to the protection of its Constitution and laws with respect to their rights of person and of property and to

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their civil and criminal responsibility"); *United States ex rel. Mezei v. Shaughnessy,* 195 F.2d 964, 968 (2d Cir. 1952) ("even a pending deportation does not make unavailable to aliens the privilege . . . against unreasonable searches and seizures."), *rev'd,* 345 U.S. 206 (1953); *Noro v. United States,* 148 F.2d 696, 698 (5th Cir. 1945) ("in a civil court trying an alien enemy for a crime committed in peace time, the [Fourth Amendment] constitutional safeguards of the accused ought to be maintained"); *United States v. Iribe,* 806 F. Supp. 917, 919 (D. Colo. 1992) ("[t]his court rejects the notion that Denver police officers are not restrained from conducting unreasonable searches and seizures of the person and property of an alien in Colorado."), *rev'd in part on other grounds,* aff'd in part, 11 F.3d 1553 (10th Cir. 1993); *Flores v. Meese,* 681 F. Supp. 665, 667 n. 3 (C.D. Cal. 1988) ("[t]he Fourth Amendment's protections extend to undocumented aliens"), *aff'd,* 942 F.2d 1352 (9th Cir. 1991), *rev'd sub nom. Reno v. Flores,* 507 U.S. 292 (1993); *United States v. Megahey,* 553 F. Supp. 1180, 1199 (E.D.N.Y. 1982) ("defendants are certainly correct in their assertion that the fourth and fifth amendments protect aliens in the United States"), *aff'd,* 729 F.2d 1444 (2d Cir. 1983); *United States v. Montez-Hernandez,* 291 F. Supp. 712, 713 n. 1 (E.D. Cal. 1968) ("[b]oth sides admit that defendant, although an alien, enjoys the protection of the Fourth Amendment, whether in this country illegally or not."); *Lassoff v. Gray,* 207 F. Supp. 843, 847 (W.D. Ky. 1962) ("[i]t is well settled that aliens while in the United States are entitled to the protection of the Constitution and evidence obtained by the government in violation of a person's right secured by the Fourth Amendment is not admissible against him in criminal proceedings"); *Valerio v. Mulle,* 148 F. Supp. 546, 548 (E.D. Pa. 1956) ("aliens in the United States are entitled to the protection of its constitution and laws with respect to their rights of person and property and they are entitled to this protection under certain circumstances, in both criminal and civil proceedings against them"); *Ex parte Jackson,* 263 F. 110, 113 (D. Mont. 1920) (applying

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Appendix B

The "predominant political impulse [of the Framers] was distrust of power, and they insisted on constitutional limitations against its abuse." *Weems v. United States,* 217 U.S. 349, 372 (1910). This Court is reminded of one of the earliest Supreme Court decisions interpreted the Fourth Amendment which cautioned

> Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. *This can only be obviated by adhering to the rule that constitutional provisions for the security of person*

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the Fourth Amendment to a deportable alien stating "[t]he Declaration of Independence, the writings of the fathers, the Revolution, the Constitution, and the Union, all were inspired to overthrow and prevent like governmental despotism. They are yet living, vital, and potential forces to those ends, to safeguard all domiciled in the country, alien as well as citizen"); *United States v. Wong Quong Wong,* 94 F. 832, 833 (D. Vt. 1899) ("papers, procured [illegally], cannot be used in evidence against persons from whom they are procured without violating the protection afforded by the amendments to all persons in this country."); *see also* Michael Scaperlanda, *Polishing the Tarnished Golden Door,* 1993 WIS. L.REV. 965, 998 (1993) ("The courts [before *Verdugo-Urquidez* had uniformly applied the Fourth Amendment to searches of aliens within the United States").

> *and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.* It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd, 116 U.S. at 635 (emphasis added.). It is with this admonition, supported by inconclusive text and a history that does not disfavor aliens that this Court declines to reach the conclusion that the definition set forth in *Verdugo-Urquidez* would deny protections of the Fourth Amendment in domestic matters.[26]

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26. It is worth noting that the Supreme Court recently discussed whether international law defined by Universal Declaration of Human Rights (Declaration), G.A. Res. 217A (III), U.N. Doc. A/810 (1948), and article nine of the International Covenant on Civil and Political Rights (Covenant), Dec. 19, 1996, 999 U.N.T.S. 171, would provide an independent cause of action for a Mexican national abducted by the DEA in Mexico and brought to the United States. *Sosa v. Alvarez-Machain,* 124 S.Ct. 2739, 2767 (2004). In concluding that such a cause of action would not lie under the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), §§ 2671-2680, and the Alien Tort Statute (ATS), 28 U.S.C. § 1350, the Court noted that "[h]is rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment, supplanting the actions under Rev. Stat. § 1979, 42 U.S.C. § 1983 and *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U [illegible]88 . . . (1971), that now provide damages

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Appendix B

3. "Substantial Connection"

While this Court concludes that the test determining whether an alien may be considered one of "the people" for Fourth Amendment purposes is inapposite to one lawfully admitted, the application of the "substantial connection" consideration to the present case would not require a contrary conclusion.

Applying the "substantial connection" standard to the facts of the present case, Plaintiff states that she made "regular trips each month into the United States [to pick up her elderly aunt's social security check at the El Paso Social Security Office] and [for] other purposes." Resp. to Mot. Summ. J. at 2. She further alleges that she had a "border crossing card" that was expired, although she further alleges that she told defendant that "her new crossing card would be coming in the mail." *Id.*

Under the law as existing at the time, "[a] valid unexpired visa and an unexpired passport ... [were required to be] presented by each arriving nonimmigrant alien." 8 C.F.R. § 212.1 (2001). "A visa and a passport [were] not required of a Mexican national who [was] in possession of a border crossing card on Form I-186 or I-586 and [was] applying for admission as a temporary visitor for business or pleasure

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remedies for such violations." *Sosa*, 124 S.Ct. at 2768. This statement addressing facts very similar to *Verdugo-Urqiduez* may itself be read as implying the viability of the very claim pursued in the present case.

from contiguous territory. . . ." *Id.* § 212.1(c). As to the validity of an expired card,

> A [border crossing card (BCC)] previously issued by a consular officer in Mexico on Form I-186, Nonresident Alien Mexican Border Crossing Card, or Form I-586, Nonresident Alien Border Crossing Card, [was] *valid until the expiration date on the card . . . , but not later than the date, currently October 1, 2001, on which a machine-readable, biometric identifier in the card is required in order for the card to be usable for entry.* The BCC portion of a B-1/B-2 Visa/BCC issued to a Mexican national pursuant to provisions of this section contained in the 22 CFR, parts 1 to 299, edition revised as of April 1, 1998 is *valid until the date of expiration,* unless previously revoked, *but not later than the date, currently October 1, 2001, on which a machine-readable, biometric identifier in the card is required in order for the card to be usable for entry.*

22 C.F.R. § 41.32(b) (2001)(emphasis added).

As the above regulations demonstrate, an alien was not permitted entry without a valid border crossing card, which effectively equates to a license to visit the United States. The license provided to aliens in possession of a valid border crossing cards was limited in scope and duration, at the time providing for travel up to 25 miles inside the United States

for no longer than 72 hours per visit. *United States v. Montero-Camargo,* 208 F.3d 1122, 1127 (9th Cir. 2000).

In the present case on the date in question, there may be some question as to whether plaintiff was entitled to enter the United States, given her concession that the crossing card she carried was not current and her replacement card was effectively "in the mail". Plaintiff, however, states that she was told that her existing paperwork could be stamped and that such stamp would serve as an appropriate alternative until her card arrived in the mail. Generally, in criminal proceedings where it has long been established that ignorance of the law is no excuse to a violation of law, *United States v. International Minerals and Chemical Corp.,* 402 U.S. 558, 563 (1971), an exception is carved for those who legitimately rely on an official statement of the law. *See Cox v. Louisiana,* 379 U.S. 559, 571 (1965); *United States v. Barker,* 546 F.2d 940, 947 (D.C. Cir. 1976) ("although the basic policy behind the mistake of law doctrine is that, at their peril, all men should know and obey the law, in certain situations there is an overriding societal interest in having individuals rely on the authoritative pronouncements of officials whose decisions we wish to see respected"). While the immigration law quoted above is not a criminal matter, the policy behind the criminal defense is that one should not be held accountable for erroneous reliance on an official statement of the law. A statement by a consular official providing what would be characterized as a gapfiller procedure for entering the United States would likely fit the definition of legitimate reliance given the general complexity of immigration law for one who practices law in the United States, and certainly for a Mexican

national that may not necessarily grasp the intricacies of the English language.

At a minimum, plaintiff's efforts would be characterized as a good faith effort to comply with the laws of the United States incident to obtaining entry. This Court would be disinclined to rest the application of the Fourth Amendment on the procedural nicety of technical compliance with the law when an official charged with issuing immigration documents required for entry states that an alien is fully compliant. There appears no dispute that plaintiff did apply for and was granted leave to enter the United States, on this particular occasion and several occasions previously. She entered sovereign United States territory voluntarily, and from the facts believing she had satisfied the requirements for entry but for an outdated card for which a replacement was being sent to her. As such, this Court would conclude that plaintiff established a substantial connection with the United States through her pattern of visitation and her efforts to comply with federal law governing admission. *United States v. Tehrani,* 826 F. Supp. 789, 793 n. 1 (D. Vt. 1993) ("[i]n the case at bar ... the defendants' presence in the United States was voluntary, and they had gained admission, albeit surreptitiously, for a temporary visit as tourists. Such connections are thus distinguishable from those in *Verdugo-Urquidez* and constitute the type of connections which would vest in aliens the protections afforded by the Fourth Amendment"); *United States v. Iribe,* 806 F. Supp. 917, 919 (D. Colo. 1992), *rev'd in part on other grounds,* 11 F.3d 1553 (10th Cir. 1993) ("Here, the question is whether only citizens of the United States have protection under the Fourth Amendment against unreasonable searches and seizures by

local police officers. A negative answer is required"); *but see Esparza-Mendoza*, 265 F. Supp.2d at 1273 (declining to conclude that previously excluded alien had developed substantial connections); *American Immigration Lawyers Ass'n v. Reno*, 18 F. Supp.2d 38, 60 & n.17 (D.D.C. 1998) (concluding that regular visits to United States would not constitute substantial connection). Plaintiff is therefore entitled to Fourth Amendment protections.

4. Wrongful Arrest

Plaintiff alleges that she was subjected to a wrongful arrest by defendant. Defendant states that she was arrested for violation of 18 U.S.C. § 111 and 41 C.F.R. § 102-74.390. Section 111(a), entitled "Assaulting, resisting, or impeding certain officers or employees," provides that "[w]hoever... forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person ... engaged in or on account of the performance of official duties ... shall ... be fined under this title or imprisoned not more than one year, or both...." Section 102-74.390, entitled "What is the policy concerning disturbances?," provides that

> All persons entering in or on Federal property are prohibited from loitering, exhibiting disorderly conduct or exhibiting other conduct on property which: (a) Creates loud or unusual noise or a nuisance; (b) Unreasonably obstructs the usual use of entrances, foyers, lobbies, corridors, offices, elevators, stairways, or parking lots; (c) Otherwise impedes or disrupts the performance of official duties by Government employees; or (d) Prevents

> the general public from obtaining the administrative services provided on the property in a timely manner.

Section 102-74.390 first appears in the 2003 version of the Code of Federal Regulations. As the events giving rise to the arrest took place in 2001, some two years prior to the appearance of the regulation, it is irrelevant to the present case.[27] The discussion is therefore limited to section 111.

A court determines whether an arrest is constitutional by balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Atwater v. City of Lago Vista,* 195 F.3d 242, 244 (5th Cir. 1999)(en banc)(internal quotation marks omitted). "[W]hen probable cause exists to believe that a suspect is committing an offense, the government's interests in enforcing its laws outweigh the suspect's privacy interests, and an arrest of the suspect is reasonable." *Id.; see also United States v. Robinson,* 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) ("[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion"). Probable cause is defined as "a reasonable ground for belief ... supported by less than prima facie proof but more than mere suspicion." *United States v. One Afghan Urial Ovis Orientalis*

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27. The regulation is adopted pursuant to 40 U.S.C. § 1315(c), which confers authority on the Secretary of Homeland Security to prescribe regulations with penalties limited to fine and/or thirty days imprisonment corresponding to a class C misdemeanor, 18 U.S.C. § 3559(a)(8).

Appendix B

Blanfordi Fully Mounted Sheep, 964 F.2d 474, 476 (5th Cir. 1992) (internal quotation marks omitted). The inquiry in assessing wrongful arrest is one of objective reasonableness. Objective reasonableness requires assessment of the actions at issue measured against what a reasonable officer would do under the circumstances. *Graham v. Connor,* 490 U.S. 386, 397 (1989).

Any attempt to resolve the question of reasonableness is thwarted by the differing accounts of the respective parties. Section 111 requires that plaintiff (1) assault, resist, oppose, impede, intimidate or interfere (2) with defendant (3) in the official performance of his duties. As to the third element,

> a federal officer engaged in performing [the] function in which employed ... in good faith and colorable performance of [his] duty ... even if effecting an arrest without probable cause, is still engaged in the performance of his official duties, provided he is not on a frolic of his own, and is protected from interference or assault.

United States v. Lopez, 710 F.2d 1071, 1074 (5th Cir. 1983) (internal citations and quotation marks omitted). If defendant's account were taken as true, plaintiff was angry about denial of entry for not having the required laser visa and began screaming at him. Mot. Summ. J. at 3. Plaintiff demanded to see defendant's supervisor and he attempted to take her to his supervisor, during which encounter plaintiff spouted profanities. *Id.* Defendant warned her against using loud and profane language. *Id.* Plaintiff elected not to see the supervisor but continued to use profanity on her return

to the pedestrian area. *Id.* at 3-4. She ultimately turned to the officers in the inspection area and shouted "[t]odos ustedes a la chingada!," meaning "[a]ll of you can go to hell" or "[a]ll of you can fuck yourselves." *Id.* at 4. At that point, defendant arrested plaintiff. *Id.*

On the facts as described by defendant, this Court would be inclined to conclude that there was probable cause for arrest. Such allegations have in the past formed the basis for criminal prosecution. *United States v. Vidaure,* 861 F.2d 1337, 1342 (5th Cir. 1988)(upholding charge of assaulting and interfering with Border Patrol Agent). The difficulty lies in plaintiff's recitation of the facts which differs markedly from defendant's account.

Plaintiff states that defendant became upset with her when presented with the expired entry documents and would not hear her explanation of what she was instructed to do by the consular officer. Resp. Mot. Summ. J. at 2. She politely asked to speak to defendant's supervisor, and he responded by yelling "Yo soy la autoridad," or "I am in charge." *Id.* Defendant then took umbrage to plaintiff's inquiry as to why he "a Mexican," like herself, would not instruct her as to the necessary steps for entry. *Id.* He became outraged, pointing to the patches at his uniform and shouting "Look at me! I am not a Mexican! Look at my uniform!" and cursing at her "Vete a la chingada!," or "[g]o fuck yourself." *Id.* Defendant did not return the crossing cards on request, instead instructing plaintiff and her aunt "to leave." *Id.* at 2-3. Defendant walked away while the two remained in place, and he turned, threw the cards at them and cursed "vete a la chingada" again. *Id.* at 3. Plaintiff picked the cards off the ground and stated to

her aunt with her voice at a level she believed only her aunt could hear "Tia, pues vamos a ver a donde esta la chingada," or "Well, aunt, let's go see where 'la chingada' is." As defendant slowly walked back to Mexico, defendant shouted at them "stop in the name of the law," at which point plaintiff stopped walking. *Id.* Defendant, physically larger and stronger than plaintiff, grabbed her arm, twisted it behind her back, pushed her into a concrete barrier and placed his knee in her lower back despite the fact that she did nothing to resist. *Id.*

The divergent accounts of the parties provided in their respective affidavits precludes summary judgment on the question of wrongful arrest. Accepting plaintiff's facts as true, she was wholly compliant with demands of defendant and did nothing that could be construed as interfering with defendant's official duties as necessary for a violation of section 111. Any argument to the contrary would be patently absurd. The resolution of the two accounts depends on credibility estimates and, as such, the ultimate determination shall be left to the jury. Summary judgment is therefore denied on the wrongful arrest claim.

5. Excessive Force

Defendant also moves for summary judgment on plaintiff's claim that defendant used excessive force in arresting her.

As with wrongful arrest claims, excessive force claims under the Fourth Amendment are governed by a standard of objective reasonableness. *Graham v. Connor,* 490 U.S. 386,

396 (1989).[28] The determination of whether the force used to effect an arrest is "reasonable" requires "a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (internal quotation marks omitted). While the reasonableness assessment is not capable of precise definition, it "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

As was the case with the wrongful arrest claim, the fact-specific inquiry in the excessive force inquiry imposes an insurmountable obstacle to defendant's pursuit of summary judgment. In defendant's account of the events culminating in plaintiff's arrest, defendant ordered plaintiff to stop but plaintiff refused to obey the order. Mot. Summ. J. at 4. He then grabbed plaintiff's wrist and plaintiff responded by

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28. The Supreme Court in *Graham* defines the excessive force standard under the Fourth Amendment with reference to the "free citizen". *See, e.g., Graham,* 490 U.S. at 395 ("[w]here, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment"). As the question of an alien's right to be free from excessive force in arrests was not before the Court in *Graham,* and as this Court has concluded that the Fourth Amendment applies with equal force to lawfully admitted aliens, the standard set forth in *Graham* governs resolution of the present claim of excessive force.

violently swinging her right hand at defendant's face. *Id.* Defendant raised his forearms to protect himself and was scratched by plaintiff, and placed plaintiff in an arm/wrist lock to protect himself. *Id.* Another officer then assisted defendant in removing plaintiff to a private area. *Id.* at 4-5. In contrast to defendant's account, and described above in the context of the wrongful arrest discussion, plaintiff states that she was completely compliant with defendant's orders, did not resist arrest but was nonetheless subjected to a forceful takedown.

Under defendant's account, plaintiff was actively resisting arrest and scratched him in the course of resisting arrest. While the crime for which she was arrested would not be characterized as severe, carrying with it a maximum sentence of one year imprisonment and/or a fine, 18 U.S.C. § 111(a), plaintiff did not respond to defendant's order to stop and actively resisted his attempt to place her under arrest. Under the facts as given by defendant, the arrest would likely be characterized as reasonable. The same may not be said of plaintiff's account. Plaintiff did not pose an apparent threat, stopped when ordered to do so and did not resist defendant's attempt to restrain her, but was nonetheless subjected to a forceful takedown by a larger and stronger officer. Such may not be characterized as reasonable force in effecting an arrest. Summary judgment on the claim of excessive force is therefore denied.

E. Fifth Amendment

Plaintiff alleges that defendant's conduct in arresting her violated her Fifth Amendment rights. Defendant argues that

the Fifth Amendment does not apply to an alien under the circumstances and further that the claim under the Fifth Amendment fails on the merits. These arguments are without merit.

1. Applicability of the Fifth Amendment

The Fifth Amendment to the Constitution provides in relevant part that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law." The Court of Appeals in *Lynch* plainly alludes to this right. All aliens, including illegal aliens, "are entitled to the guarantees of the fifth and fourteenth amendments." *Lynch v. Cannatella,* 810 F.2d 1363, 1373 (5th Cir. 1987).

> It has been settled for over a century that all aliens within our territory are 'persons' entitled to the protection of the Due Process Clause. Aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility. . . . *The Japanese Immigrant Case,* 189 U.S. 86, 100-101 (1903), settled any lingering doubt that the Fifth Amendment's Due Process Clause gives aliens a right to challenge mistreatment of their person or property.

Appendix B

Demore v. Hyung Joon Kim, 538 U.S. 510, 543 (2003) (internal quotation marks and citation omitted).

It is well-established that "[w]hatever his [or her] status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth ... Amendment[ ]." *Plyer v. Doe,* 457 U.S. 202, 210 (1982); *see also Mathews v. Diaz,* 426 U.S. 67, 77 (1976) ("The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of [the aliens within the jurisdiction of the United States] from deprivation of life, liberty, or property without due process of law"); *Wang v. Reno,* 81 F.3d 808, 817 (9th Cir. 1996) ("[w]e note ... that although the Fourth Amendment does not apply to a search on foreign soil of a foreign national's property, an alien may invoke the Fifth Amendment to challenge the admission of evidence obtained in a foreign country through means that 'shock the conscience.'"). Defendant provides no supporting authority for the proposition that the Fifth Amendment does not apply to plaintiff's circumstances, and the weight of authority firmly contradicts his argument.

2. Merits of the Fifth Amendment Claim

Defendant's argument on the merits of defendant's Fifth Amendment claim does not differ in character from the argument on the merits of the Fourth Amendment claim.

Appendix B

Defendant relies on the standard set forth in *Graham v. O'Connor,* 490 U.S. 386 (1989), as applied in resolving issues as to the merits of the Fourth Amendment claims above, as setting forth the applicable Fifth Amendment standard. Under the reasoning set forth above, this Court would agree. Mindful that the Court in *Graham* rejected the notion that all excessive force claims would be governed by "a single generic standard," *id.* at 393, the fact that the Fourth Amendment applies to plaintiff would require under *Graham* that the displacement of the substantive due process claim by the Fourth Amendment claim, *id.* at 395, regardless of whether the source of due process is the Fourteenth Amendment or Fifth Amendment.

Assuming *arguendo* that this Court were to conclude that the Fourth Amendment protections are unavailable to plaintiff, the same could not be said and *Graham* would be inapposite. *Graham* only dictates a particular standard when the Fourth Amendment and substantive due process theories could apply. *Id.* In the absence of Fourth Amendment protections, the governing standard would be substantive due process under the Fifth Amendment.

Substantive due process under the Fifth Amendment is violated by governmental conduct that either (1) deprives a plaintiff of an identified interest in life, liberty or property protected by the Fifth Amendment, or (2) "shocks the conscience." *Aversa v. United States,* 99 F.3d 1200, 1215 (1st Cir. 1996); *United States v. Salerno,* 481 U.S. 739, 746 (1987) ("So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the

conscience,' . . . or interferes with rights 'implicit in the concept of ordered liberty'" (internal quotation marks omitted)). Due process of law claims require

> an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims . . . on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

Rochin v. California, 342 U.S. 165, 209-10 (1952) (citation omitted).

Conduct that "shocks the conscience" does "more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically" and would be considered more akin to the "rack and the screw" on the spectrum running from constitutionally appropriate to constitutionally inappropriate governmental conduct. *Id.* It envisions conduct "so 'brutal' and 'offensive' that it [does] not comport with traditional ideas of fair play and decency." *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957), or conduct "properly . . . characterized as arbitrary . . . in a constitutional sense," *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998).

Defendant does not argue in the alternative that its conduct falls within the range permitted under the aforementioned standard. As such, the issue is not briefed in

the alternative and will not be addressed absent supporting authority or argument. FED. R. CIV. P. 7(b) ("motion . . . shall state with particularity the grounds therefor"). The above standard is therefore set forth only for reference in future proceedings if necessary.

Summary judgment is denied on the Fifth Amendment claim, but based on this Court's holding on the Fourth Amendment claims the parties are notified that the Fourth Amendment standard governs disposition of the present case. The Fifth Amendment claim under a substantive due process standard under *Graham* is equated to the Fourth Amendment standard and does not constitute a separate claim.[29]

IV. CONCLUSION

Defendant's motion for summary judgment (Doc. No. 37) is **denied**. Plaintiff's motion for leave to file a response to defendant's motion for summary judgment in excess of ten pages (Doc. No. 32) is **granted** Defendant's motion to stay discovery (Doc. No. 28) is **denied**

SO ORDERED.

s/ Kathleen Cardone
Kathleen Cardone
United States District Judge

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29. It could be argued that the Fifth Amendment subsumes the protections of the Fourth Amendment for aliens and they are not therefore one of "the people" and as such the Fourth Amendment would be incorporated into the due process liberty analysis. While this Court would likely conclude as much if the Fourth Amendment were not implicated, such is not necessary given the ruling in the present case.